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16-196

In the Supreme Court of the United States.

THE UNITED STATES
v.
LEE, &c.
} Nos. 219, 220.

BRIEF IN REPLY UPON THE POINT OF JURISDICTION.

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BRIEF IN REPLY UPON THE POINT OF JURISDICTION.

This action, since the amendments below, is one to oust the *United States superintendent of the cemetery, and commandant of the post* from their possession at *Arlington*, and no more.

It is submitted that a case having for its object a judicial determination of the rights of the United States to land can never be presented to a court with more title to whatever immunity they may *in any case* have from subjection to such determination.

The United States can occupy no land more strictly for government purposes than that here in controversy; nor can they occupy any more immediately.

A milltary post and a national cemetery are within the verge of the political needs of the national govern-

ment; and if Kauffman's and Strong's connection with the possession of such may be tried by action at law—in the present state of legislation and formal intervention by the Executive Department—then the possession by the President of the White House, and by Mr. Clark of the Capitol, may be passed upon in the same way as well.

The *indefinite* eloquence quoted by the learned counsel for the defendant in error, from Marshall and Webster, if effective here, may be applied to all cases of possession by the United States; and in the end the question whether the legislative or executive departments shall anywhere upon the continent have a *pou sto* for their operations come to depend upon the discretion of the judiciary: a *legal* discretion, no doubt, but nevertheless a *legal* discretion over *political* action, which, as is respectfully submitted, under our organic forms is a constitutional absurdity.

The *distribution* of the powers of American government amongst *three* great departments is of the essence of American liberty.

Those powers are, in general, the same as known in Great Britain.

In Great Britain, however, the supreme executive was also originally the supreme lawmaker, and, although by successive revolutions this has substantially ceased to be the case, yet there are many subordinate matters of modern administration in that country which are based upon the original theory—a theory that went so far indeed as to make the King virtually a *personification of England itself.*

The King *called* Parliament when he wished it to as-

semble, and he constituted the courts and commissioned the judges to hear such cases as, in the first instance, *he had chosen.*

It was as supreme lawgiver, public and private, therefore, that application was made to him for redress of any injury outside of the ordinary [illegible] powers already granted out. Su[illegible] political question—a question of t[illegible] which had been originally addres[illegible] him as to the wording of the ordinary writs. The answer to this when favorable gave the petitioner a right to apply either to court or to Parliament for a redress, the affording of which until then was constitutionally within the *discretion* of the supreme lawgiver.

The petition may be to the King in Parliament, or in any of the King's courts of record, and is usually in the treasurer's remembrancer's office. When the petition is sued *in* Parliament it may, says Staundford, be enacted and pass as an act of Parliament, or else be ordered in like manner as a petition that is sued *out of* Parliament, which is in this manner: First, after the petition is indorsed, it shall be delivered to the chancellor of England, and then shall there be a commission awarded out of the chancery to find the right or title of him that sueth the petition; which being found by inquest, then he may interplead with the King, and not before. (Chitty, Prerog., pp. 345, 346.)

The *additional* [section 18] procedure, under the statutory Petition of Right, of 23 and 24 Victoria, ch. 34, pursues the same theory in its preliminary steps. The judicial department is treated as being, until after the Queen's "gracious consideration," and her "*fiat* that right be done" indorsed upon the petition, without jurisdiction over the matter.

The constitutional theory of this proceeding for a justice outside of the ordinary channels is not difficult

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The constitutional theory of this proceeding for a justice outside of the ordinary channels is not difficult

to trace. Resort is had to the original fountain of justice, and he issues an extraordinary commission *ad hoc* to the courts, or hears it in Parliament.

Conceding, then, that an Englishman has as strict a constitutional right to proceedings under a petition of right as to those under the ordinary standing commission of the Crown, it seems plain that this right is one against the *political*, and not against the judicial, department.

The corresponding constitutional right in this country is therefore one against the legislature, which under the Constitution is the supreme power in the United States. (1 Kent, 121.)

Each of the three great departments of the Government of the United States is perfectly well equipped and organized to administer any public *justice* the administration of which has been committed to it. Within their respective spheres they are perfect representatives of American liberty. Whatever those who are called upon officially to *amend* the Constitution, or legislation, may at a proper time consider to the contrary, such must be the theory of all good and harmonious *administration* of existing law by any one of these departments; *i. e.*, that whatever the *dry* law (Constitution *and* statute) has appropriated to each has been wisely so appropriated, and, so far as *any* action is legitimate, is to be *furthered* by each of the other departments as the "best possible" appropriation. It follows that the judiciary, which has to administer such jurisdiction as law has actually be-

stowed upon it, is not at liberty (upon a theory that it is the distributor of any public justice not *judicial* in nature, or that the constitutional methods of other departments amount to a failure in *national* justice) to pronounce *soit droit fait* in any case to which its ordinary commission does not extend.

I believe that the Supreme Court of the United States has always been so advertent to its own dignity and that of its co-ordinates as to entertain no doubt that *political* justice is as completely done elsewhere as *judicial* justice is done here.

If, then, as dry matter of law the courts of the United States have no jurisdiction of an action against the United States, this will be so *held*, with a perfect conviction that whatever rights the suitor may have will be thoroughly well cared for in some other department. This court will not hear of any practical suggestion to the contrary.

I am not, therefore, concerned to deny that the plaintiff below has some cause of complaint against the United States. I neither admit nor deny that. Officially I have no eyes to perceive how that may be.

The present question is, Whereabouts in the Statutes or Constitution of the United States is there any grant of power to their courts to hear the complaint—*any grant* analogous to either the ordinary judicial commission or the *soit droit fait* in Great Britain?

This is a most dry question of law.

The legislature has passed no act giving to the courts a special jurisdiction in this case *by name.* Such an act would have been strictly analogous to the *old* petition of right to the King *outside of* Parliament.

Neither has the legislature passed a private act giving remedy itself.

That would have been analogous to the old petition of right addressed to the King *in* Parliament, and leading to an enactment there.

Nor is the case one within the act creating the Court of Claims.

That act is similar to the act of Victoria above cited.

The legislature, therefore, has considered that it is under no obligation to order *soit droit fait* in this particular case, supposing it not to come under the ordinary statutory commission of the courts.

For that action, or inaction, the legislature alone is responsible. Neither this court nor any of its ministers will undertake to measure the extent of that responsibility, or to suggest that it will not easily and successfully be met.

The question is therefore narrowed down to an inquiry whether *ordinary judicial process* can be applied to oust the United States from the possession of property after the court whose process is invoked has been informed,

by the proofs and also the formal intervention of the Executive Department, that such property is occupied for governmental purposes.

It is, I say with all respect, *idle* to suggest that this action has not ouster for its legitimate fruit; or that if the court has power to give judgment it has not power as well to issue execution. If courts of the United States are justifiable under the *mesne* process they are so equally under the *final*. A court that decides that it has jurisdiction will see that that jurisdiction *means business*, and authorizes something more than a mere *moot* proceeding.

To recur, then, to the facts here:

Kaufman and Strong are agents of the United States, without interest; in law, *mere servants;* such persons as ordinarily ejectment could not be brought against, for their master was upon the land with them. Here it is only because the master is invisible that the action is at all competent. But still that invisibility must be of no *disadvantage* to the master. In other words, the case is to be regarded *exactly* as if the master was sued.

In substance, then, the United States are to be regarded as the direct defendants; the names *Kaufman and Strong* mean *pro hac vice* neither more nor less than *The United States.*

Can *they* be *sued* on account of *political* action, whether *factum* or *in fieri*, any more than on account of *judicial* or *executive* action? Can any one of these departments redress public constitutional action or inaction by the other, no matter how much, abstractly considered, such

action is erroneous? In all such, is it not true that each "stands or falls *to his own master*"—waiting at the ballot-box?

The *general rule* cannot, as it seems, be denied. THE UNITED STATES IS NOT SUABLE. They are not suable, except where the same is specifically authorized, *about anything*, much more not *here* where the object (*technically considered*) is to maim them in a solemn governmental function.

In Carr *v.* The United States (98 U. S., 433) it was sought to estop the United States by judgments obtained some years before in a State court in suits against their agents, these suits having been defended by the United States attorney for the district and also by counsel specially retained by the Secretary of the Treasury. But this court said:

> We consider it a fundamental principle that the government cannot be sued except by its own consent. * * * In some cases it might not be apparent until after suit brought that the possession attempted to be assailed was that of the government; but where this is made apparent by the pleadings or the proofs, the jurisdiction of the court ought to cease (pp. 437, 438).

Carr's case seems to have been well argued, thoroughly considered, and unanimously adjudged. It coincides with the current of authority in common-law countries for many centuries. (Chitty, Prerog., 339; Kent, I, 297, n. e.)

However, certain previous decisions by this court are cited by the learned counsel for the defendants in error as contradictory to this.

In order to make out such contradiction it seems that a case must be shown in which this court has *enforced* process against the United States. It is not enough to show cases in which counsel for one party may have made a suggestion of an interest in the United States and at the same time indicated a wish to have *the title* of the government assured by a *judicial* determination, *the court in the event giving judgment in favor of the government.*

Wilcox *v.* Jackson (13 Peters, 498) was a writ of error to a State court. The case had not, so far as appears, been argued in the State court, or afterwards in this court, upon the point of the non-liability of the United States to suit, and the court contented itself with reversing the judgment (which had been against the interests of the United States) for the error assigned upon the matter actually discussed below.

So in Brown *v.* Huger (21 How., 305) and Grisar *v.* McDowell (6 Wall., 363), *the merits* were decided in favor of the interests of the United States, the court taking no notice of the point now under consideration.

Allowing, as is said in Carr's case, that it was not competent for those who represented the United States—the Attorney-General being one—to waive the point whether they were suable, still the court would not have been apt *proprio motu* to advert to *that* if high officers of the government were asking for a decision, and the matter could be ended in its *favor* without having recourse to a doctrine which would leave undecided the question whether the plaintiff had not *on the merits* cause of complaint against the United States in some one of its departments. Looking at the easy dealing of courts in like matters when not pressed by crowded dockets

or sharply defined contention, it seems inadmissible to affect the science of the law by judicial action which to some extent contents both parties, *the one* by hearing on the merits, and *the other* by awarding those merits to him.

In no one of the three cases above is there any evidence upon the face of the report that the question as to the liability of the United States to suit in court was presented by counsel or considered by the court. That point, therefore, passed *sub silentio.*

The same is true of Meigs *v.* McClung (9 Cranch, 11). The counsel in this court did not allude to the point alluded to above. Mr. Lee, once Attorney-General, appeared for the interests of the government, and stated the "principal question" to be as to *the situation* of the land in controversy. The record would no doubt have allowed the present point to be developed. But the question actually sent up from below was, whether the court would not upon the facts decide as matter of law *that the United States have title;* not *that they are not suable;* and in that way the court alludes to it; *i. e.*, that as matter of law the other party had the title and "could sustain his action." In this case, therefore, as in the three last named, the court's attention was not called to the question now under argument, and in deciding against *the title* of the United States the court decided upon the only point argued and submitted.

Cooley *v.* O'Connor (12 Wall., 391) was an action against *tenants* of the United States. In such case, I submit that the rights of the latter may come before a court *only* as matter of law—a landlord's title—for the recovery is only of the tenant's possessory interest. When the United States sell land, whether in fee or at

will, their purchaser stands on the same footing as other purchasers. His rights depend upon his title, and that is matter of mere law. The distinction here is between a *tenant* and a *servant;* the possession of the latter being, of course, an *immediate actual* possession by the master, and indeed *no possession at all* where the master is also actually present.

The immunity of the United States from suit in its own courts and in courts of the States, stands upon a different footing from that of the States in courts of the United States. The United States are not liable to suit *upon grounds of sovereignty*, an original head of immunity under universal public law. Upon the other hand the States are not suable in courts of the United States merely *because of a prohibitory provision of municipal law* (Amendment XI). The measure of this latter immunity therefore is the terms of that prohibiting clause. These terms do not, as has been decided, include such suits as those of Osborne *v.* The Bank of the United States, Swasey *v.* The Railroad Company, and the like.

That class of cases therefore throws no light upon the question here pending.

S. F. PHILLIPS,
Solicitor-General.

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Brief of S. Ferguson Beach,
Of Counsel for Defendant in Error.

ON RE-ARGUMENT, OCTOBER TERM, 1882.

ALEXANDRIA, VA.
Ramey & Son, Printers, 11 S. Royal Street.
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In discussing what is called the jurisdictional question arising on the record brought up by these writs of error, it will be convenient, in the first place, to look at and deal with the record, as it would stand, if the action against Kaufmann and Strong had proceeded to judgment, without direct intervention on the part of the United States.

I discard, therefore, for the present, the extraordinary part of the record—that is to say, the part engrafted upon it by the Attorney General's suggestion and the proceedings growing out of that—and take up the record proper of Kaufmann and Strong.

In defending this action below, these defendants marked out two lines of defense.

First, they prepared to contest our proof of title, confronting us on that ground.

Should they fail there, they prepared to fall back upon a second position, to wit, the fact that the property sued for was in the possession of the United States.

This position, more fully stated, was, that the United States was the real party in possession of the property, and that this fact alone was sufficient to defeat the action, whatever we might show in the way of title, because, in such case, the action was substantially an action against the United States and therefore was not maintainable.

So they prayed the Court to instruct the jury, that if they believed the United States was actually in possession of the property, they must find for the defendants, on that ground alone, irrespective of what might be shown in the matter of title.

See the several instructions on which the plaintiffs here (brief, pp. 11, 12) have raised their third, fourth and fifth assignments of error.

The Court was asked to say to the jury, even though the plaintiffs do prove title and right of possession in themselves, they must fail in this action, if the actual possession is in the United States—the United States cannot be dispossessed in this manner.

These instructions involved, as will be seen, the indispensable assumption, that the United States, in its character as a sovereign, might be in the actual possession of the property, though, at the same time, the legal right of possession might be in the plaintiffs.

Is this assumption warrantable?

I think not. I affirm and undertake to establish, as a true proposition, that the United States, as a sovereign political corporation, cannot possibly hold possession of property, unless it has, at the same time, the legal right of possession.

In other words, possession of property by the United States is incompatible with right of possession in another.

In still other words, to determine whether possession of property, in a given case, is the possession of the United States, it must first be

ascertained whether the United States has legal right of possession, and unless this is settled affirmatively, the possession cannot be imputed to the United States as being its possession.

If this proposition be a true one, its relevancy to the present case is manifest—the defendants, in asking their instructions, were asking the Court to embody, in one ruling, two distinct propositions directly contradictory of each other.

It will be conceded that possession by an officer or agent of the United States, though held avowedly in the name and on behalf of the United States, is not necessarily the possession of the United States; it may be only the possession of the individual occupant.

At the same time, it is equally true, that whenever the United States is in possession of property, such possession is by its officers or agents, acting in its name and on its behalf.

All the outward and visible signs of possession in any two cases may therefore be the same, and yet we cannot tell, by these, whether the possession is or is not the possession of the United States.

The outward and visible signs furnish no test by which to determine the character of the possession.

A corporation aggregate, from the nature of its organization, can hold possession only through its agents duly appointed for the purpose.

To determine then whether a possession, held by an officer or agent of the United States, claiming to hold only for the United States, is or is not the possession of the United States, we must determine whether he holds by direction and command of the United States.

If he does hold by such direction and command, his possession is the possession of the United States—if he does not hold by such direction and command, his possession is simply and only his individual possession, however much he may disclaim all intention of holding in any other than a representative character.

The direction and command of the United States—the presence or absence of this—is the test by which to determine the true character of any possession claimed to be the possession of the United States.

This being settled, let us see in what manner and by what means the United States gives its directions and commands.

The United States, as a political sovereign, dealing with the citizen, gives its directions and commands through the Constitution and the laws made pursuant thereto.

It has no other mode of giving expression to its will.

This is its one exclusive mode.

A direction or command given otherwise than by this mode, is not, cannot be the direction or command of the United States.

The complete expression of its will involves, to be sure, in the great majority of cases, the employment of ulterior instrumentalities, in the form of officers and agents.

The commands and directions of these, however, are the commands and directions of the United States, so far and so far only, as authority is found for them in the Constitution and in the laws made pursuant to it.

Their commands and directions cease, at once, to be the commands and directions of the United States, and become their own mere individual commands and directions, as soon as they conflict with the Constitution or with any constitutional law.

Even though their commands and directions may be in conformity with what has the perfect form of a law, if that law be in conflict with the Constitution, the United States does not then speak through them.

They then speak simply for themselves.

It is impossible for the United States, as a political sovereign, to give a direction or command which shall destroy or impair the enjoyment of any right guaranteed by its constitutional provisions.

By the act of adopting the Constitution, it made itself powerless for such a purpose.

The machinery of its government established by the Constitution is so framed, and designedly so framed, as to make it impotent to work any such result.

The United States is powerless to command or direct an act which violates the provisions of its fundamental law, as an armless man is powerless to deliver a blow—it lacks the organs through which, alone, such command or direction could be given.

The Executive cannot give it, the Congress cannot give it, the Judiciary cannot give it.

Even should they assume to give it, it is to be remembered that the United States speaks through its appointed agencies when, and only when, they act within the scope of their actual authority—it is not enough that their action be within the scope of their apparent authority.

When, therefore, the Constitution declares that no man shall be deprived of life, liberty or property, without due process of law, an act which does deprive one of his property, without such process, cannot be an act done by command or direction of the United States.

The command or direction may be indeed that of an officer of the United States—perhaps of its highest officer—but, in such case, it is the mere command of the individual giving it, and is not the command of the sovereign.

An act which deprives one of his rightful possession—which sunders the possession from the right of possession—cannot be an act done by command or direction of the United States, but if done, must be done in opposition to its command.

As, therefore, the United States can hold possession of property, only through its officer or agent, duly appointed for the purpose, and as it is powerless to appoint an agent to perform an act forbidden by its Constitution, it unavoidably follows, that the possession of property to which another has right of possession, cannot, by possibility, be imputed to the United States.

To make the possession by Kaufmann and Strong, in the present case, the possession of the United States, their possession must have been directed by the United States.

But it could not have been directed by the United States, if the right of possession was not in the United States, because of the pre-existing, standing, continuing direction of the United States, embodied in its Constitution—a direction unchangeable except by the change of the Constitution itself—that the one having the right of possession should not be deprived of the enjoyment of that right.

The only direction which the United States could give, and the one which, in fact, it did give, was the general direction that the defendants should not invade or withhold the possession of property to which it was not entitled, so that, assuming the title of this property to be in the plaintiffs, the defendants held possession, not in pursuance of, but in opposition to, the direction and command of the United States.

Their possession, on the concession that we had the right of possession, could not have been the possession of the United States, and the action against them could not be an action against the United States.

The distinction to be kept in view, is the obvious distinction between the United States as a body politic, and the officers of the United States.

"By a State, I mean a complete body of free persons, united together for their common benefit, to enjoy peaceably what is their own and to do justice to others.

"It is an artificial person.

"It has its affairs and interests; it has its rules; it has its rights and it has its obligations."

Wilson, J., Chisholm *vs.* Georgia. 2 Dallas 455.

Such is the United States.

Its sovereignty, unlike that of Great Britain, is not represented in the person of any one functionary, or of any number or body of functionaries, except so far, and only so far, as he or they, for a special purpose or a special occasion, are charged, by law, with the exercise of its recognized powers.

But, it may be said, under the proposition above asserted, the President might be sued for the White House, or Congress might be sued for the Capitol.

Is there anything logically, legally or practically absurd in affirming that they might be?

The absurdity lies in affirming the contrary.

Suppose by the arbitrary direction of the President, the White House should be abandoned, and the mansion of a private citizen should be seized, converted into and occupied as a Presidential residence.

Would not ejectment lie against the President for this property? Could he defeat the action on the ground that his possession was the possession of the United States?

And so of Congress in a corresponding case.

Neither the dignity of the officer taking such possession, nor the dignity of the uses to which the possession is devoted, would render it the possession of the United States and exempt the occupants from suit.

Nothing short of legal right of the United States to possession would work such a result.

A suit for the tower of London would, to be sure, be an absurdity, and it would be so, because the tower of London is visibly in the possession of the sovereign, or of the officers of his appointment, for in England, unlike what is true of the United States, the visible signs of possession do furnish a test by which to determine the character of the possession.

And the reason for this difference is obvious.

The sovereignty of England is permanently and completely represented in the person of the King, in whom resides all the fullness of the sovereignty, bodily.

The sovereign of England is a natural person, having all the capacities and powers of a natural person, in whom the natural and corporate character so unite and blend into one, that the act or word of the man is the act or word of the sovereign.

The United States as a sovereign, has no such permanent, complete concrete form—like every corporation aggregate, it is an invisible, intangible person, acting and speaking immediately only through its organic law, and mediately only through agents appointed by law, with functions declared and defined by law.

The President is not the sovereign, Congress is not the sovereign, both together are not the sovereign.

Whilst, therefore, the possession of the King, or of his officers acting by his command, is absolutely the possession of the sovereign, the possession of the President, or of Congress, or of officers acting by their command, is not absolutely the possession of the United States; it is only conditionally such, the indispensable condition being, that warrant for such possession be given by law.

But the law, as I have shown above, cannot, by possibility, give warrant for withholding possession from one who has right of possession, and the United States cannot therefore be in possession, whatever may be the outward signs of possession, when the right of possession is in another.

At this point, it will be convenient to recur to what I have designated the extraordinary part of the record, the part of it specially due to the suggestion of the Attorney General.

The proposition for which I have been contending, if it be sound, exposes the complete futility of that proceeding, and vindicates the action of the court in dismissing it on demurrer.

The proceeding is avowedly drawn from English precedent, and is justified, exclusively, on that authority.

It implies that the question of the sovereign's possession is one determinable as a preliminary question, without examination into the state of the title.

And such a question is so determinable, as we have seen, in England, where the sovereign, like any other person, may be in actual possession of property, though the legal right of possession be in another.

The proceeding in England has, therefore, a substantial basis on which to rest.

Here, however, the foundation for it is wanting, wholly.

The question of the sovereign's possession, and the question of its legal title, are not separable.

This collateral proceeding is, thus, one by which nothing can be determined, except as it is determined by the result of the main cause, and it is therefore purely idle and superfluous.

From this inseparability there results another consequence, pertinent to be here noticed, which is, that the acknowledged exemption of the United States from suit without its consent, cannot be made of practical value as a ground of defense in cases where the action against it is not such, in form.

It is conceded, of course, that an action which is not an action against the United States in form, may nevertheless be such in fact.

An action against the United States, *eo nomine*, falls at the threshhold. It bears upon its face the fact which is fatal to its prosecution.

An action which is not, *eo nomine*, an action against the United States, does not fall *in limine*; it proceeds up to the point where it is made to appear, that it is, in reality, an action against the United States, and then falls.

But that point is only reached, when the point of showing that the United States has legal title to the subject of controversy is reached—at which point, with or without the principle referred to, the action must, of course, fail.

The principle, however, is not itself infringed, though it fail, in such cases, in practical value.

The argument, then, is this: To render the action against Kaufmann and Strong an action against the United States it must appear that their possession is the possession of the United States;

this can only be shown by proof that they hold and occupy the property by direction of the United States; but they cannot hold and occupy by its direction, if the plaintiffs show legal right to the possession in themselves, because the United States cannot give directions which conflict, as such a direction would conflict, with its organic law. The court below therefore, rightly rejected the defendants proposition that possession by the United States would defeat the plaintiffs' proved right of possession, as it involved a contradiction to affirm that the United States could have possession, when the plaintiffs had right of possession.

S. FERGUSON BEACH,

Of Counsel for Defendant in Error.

ALEXANDRIA, VA., August 7, 1882.

NOTE.—Since the foregoing brief was printed, I have been furnished with the Pacific Coast Law Journal of Aug. 19, 1882, in which is reported the decision of the Supreme Court of California in the case of King *vs.* La Grange.

The case is substantially identical with this case, on the question of the right to maintain the suit, and on a review of all the authorities, the right is sustained. S. F. B.

16-196

IN THE

Supreme Court of the United States.

THE UNITED STATES, Plaintiff in Error,
vs.
GEORGE W. C. LEE.
NO. 219.

FREDERICK KAUFMAN and
RICHARD P. STRONG, Plaintiffs in Error,
vs.
GEORGE W. C. LEE.
NO. 220.

ALEXANDRIA, VA.
Ramey & Son, Prs., 11 S. Royal Street.
1881.

The general course of the trial consisted, first, of testimony by the plaintiff to prove title in him prior to and at the time of the tax sale, and his subsequent dispossession by the defendants; second, of testimony by the defendants to show their acquisition of title by the tax sale; and thirdly, of testimony by the plaintiff to show that the tax sale was illegal and void.

Tax titles acquired under the act referred to have been frequently before this Court, the leading cases being Bennett *vs.* Hunter, 9 Wallace 326, and Tacey *vs.* Irwin, 18 Wallace, 549.

By the terms of the act, the tax sale certificate is made *prima facie* evidence of the regularity and validity of the sale, and of the title of the purchaser, with a proviso that it shall only be affected as evidence of such regularity and validity, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of the act.

The Tax Commissioners were to allow sixty days from the time of fixing the amount of the tax chargeable upon the different parcels of land, for the payment of the tax.

Lands upon which the tax remained unpaid at the expiration of that period became thereupon forfeited and liable to sale after four weeks notice.

It appeared in the cases of Bennett *vs.* Hunter and Tacey *vs.* Irwin, that the Tax Commissioners in executing this law, construed it as forbidding them to accept the tax on property so advertised for sale, pending the advertisement and subsequent to the advertisement unless it was tendered by the owner, (or some one having an interest in the land,) in his own proper person.

On their construction, the land, once advertised, was bound to be sold, though there might be dozens of persons tendering payment, unless the owner appeared personally before the Commissioners and himself made the tender with his own hand. And they went on selling in the face of tenders by agents and friends, and issued their certificates of sale to the purchasers, treating the act as a device to get the land and not to get the tax.

It appeared that during the sixty days allowed for the payment of the tax, the Commissioners made no active efforts to collect the tax, made no demand for it and gave no notice even of the fact that it was

fixed and payable, except a newspaper notice of a dozen lines not authorized by the act and therefore of no account, even as constructive notice, but sat passively in their office waiting for the period to expire and immediately on its expiration advertised the land for sale as forfeited, refusing thereafter to take payment from any one but the owner in proper person. This was their inflexible rule.

In Bennett *vs.* Hunter the Court held, that the tax was payable at any time prior to the sale and by anybody whose agency was not disavowed by the owner, and that a sale after such payment or tender of payment was illegal and void.

In Tacey *vs.* Irwin the Court held that the rule of the Commissioners not to accept payment on property after advertisement of sale, except from the owner in person, itself dispensed with the necessity of a tender, that the unqualified general refusal of the Commissioners, in advance, to accept payment except in one particular manner, when the true construction of the law allowed payment in any manner, was a denial of the opportunity of payment, without which there could be no default and no liability to sale.

A reference to the briefs filed in that case will show that the argument was chiefly on the effect of this rule established by the Commissioners.

"Such a rule," says the Court, "of necessity dispenses with a regular tender in any case. In the absence of any proof to the contrary, it is a legal presumption, that the tax in this case, though not actually offered, would have been offered and paid before sale but for the known refusal of the Commissioners to accept any offer when not made by the owner in person."

On the trial of this present cause, the plaintiff having offered the proof of his title prior to and at the date of the tax sale, and of his dispossession by the defendants, rested.

The defendants then offered their certificate of sale and rested, relying simply upon that.

The plaintiff thereupon offered evidence tending to prove a tender of payment prior to the sale, and also evidence tending to prove the above mentioned rule of the Tax Commissioners.

On the prayer of the plaintiff, the Court, with this evidence, instructed the jury (transcript, p. 105-6) as follows:

IN THE

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These two causes are but a single cause, brought up under two writs of error.

The action was ejectment, by G. W. C. Lee for the recovery of an estate of eleven hundred acres of land in Alexandria County, Virginia, opposite the city of Washington, known as Arlington.

It was instituted in the State Court, and on the petition of the defendants, was removed to the Circuit Court of the United States. It was defended, first, on a plea to the jurisdiction; this defence having been overruled, it went to trial on the merits and resulted in a judgment for the plaintiff.

This brief will deal only with the questions which arise after the plea to the jurisdiction had been overruled.

The main question in the cause was the validity of a tax title to the property, acquired by the United States at a tax sale made under the Act of Congress, approved June 7, 1862, entitled, "An Act for the collection of direct taxes in Insurrectionary Districts within the United States and for other purposes." 12 Stat. 422.

The general course of the trial consisted, first, of testimony by the plaintiff to prove title in him prior to and at the time of the tax sale, and his subsequent dispossession by the defendants; second, of testimony by the defendants to show their acquisition of title by the tax sale; and thirdly, of testimony by the plaintiff to show that the tax sale was illegal and void.

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"Such a rule," says the Court, "of necessity dispenses with a reg-"ular tender in any case. In the absence of any proof to the con-"trary, it is a legal presumption, that the tax in this case, though not "actually offered, would have been offered and paid before sale but "for the known refusal of the Commissioners to accept any offer when "not made by the owner in person."

On the trial of this present cause, the plaintiff having offered the proof of his title prior to and at the date of the tax sale, and of his dispossession by the defendants, rested.

The defendants then offered their certificate of sale and rested, relying simply upon that.

The plaintiff thereupon offered evidence tending to prove a tender of payment prior to the sale, and also evidence tending to prove the above mentioned rule of the Tax Commissioners.

On the prayer of the plaintiff, the Court, with this evidence, instructed the jury (transcript, p. 105-6) as follows:

"1st. If the jury believe from the evidence that Philip R. Fendall, "for and on behalf of the owner of the property in controversy, prior to "the sale thereof by the Tax Commissioners, on the 11th day of Jan- "uary, 1864, offered to pay the amount chargeable on said property, "under the Act of Congress, entitled, 'An Act for the collection of "direct taxes in Insurrectionary Districts within the United States, and "for other purposes,' approved June 7, 1862, and the acts amendatory "thereof, and that said offer was refused by said Commissioners be- "cause it was not made by the owner in person, then said sale was un- "authorized and conferred no title upon the purchaser."

"2nd. If the jury believe from the evidence that the Commission- "ers, prior to January 11th, 1864, established, announced, and uni- "formly followed a general rule, under which they refused to receive "on property which had been advertised for sale, from any one but "the owner or a party in interest in person, when offered, the amount "chargeable upon said property, by virtue of the said Acts of Congress, "then said rule dispensed with the necessity of a tender, and in the "absence of proof to the contrary, the law presumes that said amount "would have been paid, and the Court instructs the jury that upon "such a state of facts the sale of the property in controversy, made on "the 11th day of January, 1864, was unauthorized and conferred no "title on the purchaser."

The exceptions taken by the defendants during the progress of the the trial all appear in the Bill of Exceptions, extending from page 72 to page 134 of the transcript.

It will be convenient and sufficiently accurate to group them under three heads.

1. Exceptions intended to raise the question of jurisdiction.

2. Exceptions to the rulings of the Court bearing on the validity of the tax sale.

3. Exceptions to the Court's rulings on points of practice and proceedings.

AS TO THE FIRST CLASS.

These exceptions were taken on the refusal of the instructions to be found on pp. 103, 104 and 105, and *manuscript* p. 225, and to the granting of the instruction to be found on *manuscript* p. 226.

The question raised by them, as before stated, does not fall within the scope of this brief and it is therefore passed.

AS TO THE SECOND CLASS.

The essential proposition involved in all the exceptions of this class is the supposed error of the Court in granting the instructions of the plaintiff hereinabove set out.

The proposition is presented in various modes, viz: In objections directly to the instructions, (pp. 105, 106), in prayers for conflicting instructions, (*manuscript*, pp. 185, 186), and in motions to strike out evidence offered by plaintiff to prove tender of payment and the rule adopted by the Commissioners, (pp. 102, 103).

If these instructions were properly granted, none of the defendants' exceptions under this head were well taken—and that the instructions were properly granted, we maintain on the authority of the two cases already cited.

AS TO THE THIRD CLASS.

a. The first of these, (p. 73), is an objection to the ruling of the Court excluding a plea in the nature of a disclaimer, tendered by some of the defendants.

This plea was rightly rejected.

The action of Ejectment, in Virginia, is a statutory action throughout. Every step in the action, from beginning to end, is expressly prescribed by the statute.

A copy of the statute is subjoined, by which it will, among other things, appear, that the only plea admissible in the action, is the plea of "not guilty."

All defences are to be made under this plea.

b. The second, (p. 76), is an objection to the certified copy of the probate of the will of G. W. P. Custis as proof of the will, (which was a link in the plaintiff's title), on the ground that the original will should be offered, as being the best evidence.

The usual and recognized mode, in Virginia, of proving a will by one claiming title under it, is the production of the evidence of its probate. Morrison *vs.* Campbell, 2 Randolph, 217.

And had there been validity in the objection, it was removed by the testimony of Mr. Marye, (p. 83), in connection with which, however, the exception was renewed.

By this witness the original record of the probate was offered to the jury, coupled, too, with proof that the original will had been lost.

c. The next exception under this head (p. 86) is to the line of cross-examination allowed the plaintiff in the case of the defendant's witness, John Hawxhurst.

Conceding that the rule, as now established, restricts the cross-examination of a witness to the subject matter of his testimony in chief, the plaintiff here was entirely within the rule.

Nor was it immaterial to show, as this testimony did show, that the certificate of sale in this case was issued and accepted in fraud of the law.

Though no prayer to that effect was founded upon it, the fact proved by it, nevertheless, showed the certificate void from the beginning.

By the requirement of the Act, the certificate was issuable only on payment of the amount bid.

By Section 36 of the Act of Aug. 5, 1861, 12 Stat. at Large, p. 292, (of which the Act of June, '62, is to be construed as forming a part, Bennett *vs.* Hunter, p. 333), the excess of purchase money, over tax and costs, was to be paid to or held for the owner of the property sold.

The sale being only for the payment of the tax, the owner, if he acquiesced in the sale, was entitled to the surplus proceeds.

It was, therefore, both pertinent and material to show, that of the $26,800 bid at the sale by the United States, not one cent was ever paid—that the certificate was, therefore, issued by the Commissioners and accepted by the purchaser, with full knowledge on the part of both, at the time, that its issue was in violation of law.

In principle, the case as thus exhibited, was not different from what it would have been, had the Commissioners issued their certificate of sale, without, in fact, having had a sale.

d. The next exception of this class is to the refusal of the Court to give the instruction commencing at the bottom of page 107 of the transcript.

This instruction raises the question of the sufficiency of the plaintiff's proof of title.

The plaintiff claimed title in fee under the will of his grandfather George Washington Parke Custis, by whom the property was devised to him, in remainder, after a life estate to Mrs. Lee, his mother.

Proof that the grandfather died seized in fee of the will of the grand-

father, and of the death of the life tenant, was, therefore, necessary, and all that was necessary to establish the title claimed.

To prove that the grandfather died seized, the plaintiffs proved that he died in possession, a possession which he had held for forty years, (Geo. R. Adams' deposition, p. 80), and more.

That this was sufficient, see 2 Greenleaf on Evidence, (Ejectment), § 311; Adams on Ejectment, pp. 281–2; 1 Saunder's Pleading and Evidence, (Ejectment), 1005.

Actual possession is always *prima facie* evidence of seisin in fee, and in the absence of countervailing evidence, no other proof of it is necessary.

Having thus shown the seisin, death, (1857), and will of the ancestor, and the death (1873) of the life tenant, the plaintiff was entitled to prevail, in the absence of a better title shown by the defendants.

e. The next exception was to the ruling of the Court, (p. 111), allowing the plaintiff to suffer a non-suit as to all the defendants, except the defendants Kaufman and Strong.

There was no error in this ruling.

The Ejectment Statute (see § 5), requires that "the person actually occupying the premises shall be named defendant in the declaration."

It may easily and frequently happen that persons who are apparently in occupation, and who are therefore made defendants in the declaration, are shown, in the course of the trial, to be not the real occupants.

By the statute of Virginia, a non-suit may be suffered at any time before the jury retire from the box.

The mode, therefore, of discontinuing proceedings against defendants who are found not to have been properly made such, is to suffer a non-suit as to those defendants.

At the stage of the proceedings in this cause, where the non-suit was allowed, it had been shown that the real occupants of the premises were Kaufman and Strong, the others being freedmen or soldiers subject to their orders, as servants to a master, and the non-suit was therefore properly asked and properly allowed.

Nor did the discontinuance of the action as to the defendants found not to be occupants involve its discontinuance as to those found to be the actual occupants. See Ejectment Statute.

f. The next exception under this head was on the refusal to give the instruction found on page 121 (*manuscript*, p. 224), of the transcript.

This instruction was rightly refused, the whole ground of it and the whole law of the point involved in it being covered by and contained in the five instructions on page 122, given at the request of the defendants.

The final exception (p. 123) to the denial of a motion for a new trial being but the repetition, in a general form, of the particular exceptions previously taken, does not require notice.

On the whole the relation of the United States to the property appears to be that of one, who, having paid nothing, takes, holds and occupies with the strong hand.

The pretense of a title of record is a pretense only.

The paper which it exhibits as such title was issued, as it knew, in violation of law, and an estate whose valuation, (even for purpose of taxation), was $34,100, is withheld from the owner, without the semblance of process of law.

Disclaiming any purpose of demanding restitution of the estate *in specie*, and intending, by the institution of this suit, only to show his title thereto, he submits that the judgment below should be affirmed.

S. FERGUSON BEACH,

Of Counsel for Defendant in Error.

ALEXANDRIA, VA., Dec. 8, 1881.

APPENDIX.

CHAPTER CXXXI. CODE OF VIRGINIA, (1873).

OF THE ACTION OF EJECTMENT.

When, where and by whom it may be brought.

1. The action of ejectment is retained, and may be brought as heretofore, subject to the provisions hereinafter contained.

2. It may also be brought in the same cases in which a writ of right may now be brought, and by any person claiming real estate in fee or for life, or for years, either as heir, devisee, or purchaser, or otherwise.

3. Every action shall be brought in the circuit, county, or corporation court of the county or corporation in which the real estate or some part thereof is.

4. No person shall bring such action unless he has, at the time of commencing it, a subsisting interest in the premises claimed and a right to recover the same or to recover the possession thereof or of some share, interest, or portion thereof.

Who to be defendant.

5. The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising acts of ownership thereon, or claiming title thereto, or some interest therein at the commencement of the suit. If a lessee be made a defendant at the suit of a party claiming against the title of his landlord, such landlord may appear and be made a defendant with or in place of the lessee.

How action commenced, and what to be stated in declaration.

6. The action shall be commenced by the service of a declaration, in which the name of the real claimant shall be inserted as plaintiff,

and all the provisions of law concerning a lessor of a plaintiff shall apply to such plaintiff.

7. It shall be sufficient for the plaintiff to aver in his declaration that on some day specified therein (and which shall be after his title accrued) he was possessed of the premises claimed, and being so possessed thereof, the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, such sum as the plaintiff shall state.

8. The premises shall be described in the declaration with convenient certainty, so that from such description, possession thereof may be delivered.

9. The plaintiff shall also state whether he claims in fee, or for his life, or the life of another, or for years, specifying such lives or the duration of such term, and when he claims an undivided share or interest, he shall state the same.

Declaration may contain several counts; how several parties may be named therein.

10. The declaration may contain several counts and several parties may be named as plaintiffs jointly in one count and separately in others.

Notice to defendant, and service of it; if defendant fail to appear, judgment.

11. To such declaration there shall be subjoined a notice, in writing, by the plaintiff or his attorney, addressed to the defendant, and notifying him that the said declaration will be filed, on some specified rule day, in the clerk's office of the court in which the suit is to be prosecuted, or in court, on some named day in the then next term of said Court. Such declaration and notice shall be served in the same manner as other notices.

12. Upon filing the declaration, with proof of the service of notice thereof as aforesaid, the plaintiff shall be entitled to a rule upon the defendant to appear and plead at the next rule day, if the declaration be filed at rules, or if filed in Court, to appear and plead within such time as shall be prescribed by the Court; and if, upon service of such rule, he shall fail so to appear and plead, his default shall be entered and judgment given against him.

Of the defence; what given in evidence on the plea.

13. The defendant may demur to the declaration, as in personal actions, or plead thereto, or do both; but he shall plead the general issue only, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff in the declaration.

Upon such plea, the defendant may give the same matter in evidence, and the same proceedings shall be had as upon a plea of not guilty in the present action of ejectment, except as herein otherwise provided, and he may also give in evidence any matter which, if pleaded in the present writ of right, would bar the action of the plaintiff.

What the plaintiff is to prove.

14. The consent rule heretofore used, is abolished. The plaintiff need not prove an actual entry on, or possession of the premises demanded, or receipt of any profits thereof, nor any lease, entry or ouster, except as hereinafter provided. But it shall be sufficient for him to show a right to the possession of the premises, at the time of the commencement of the suit.

When several plaintiffs or defendants, what to be proved, and what verdict rendered.

* * * * * * * * *

16. If the action be against several defendants and a joint possession of all be proved, and the plaintiff be entitled to a verdict, it shall be against all, whether they pleaded separately or jointly.

When there may be several judgments against the defendants.

17. If the action be against several defendants, and it appear on the trial that any of them occupy distinct parcels in severalty or jointly, and that other defendants possess other parcels in severalty or jointly, the plaintiff may recover several judgments against them, for the parcels so held by one or more of the defendants, separately from others.

Part of premises claimed may be recovered.

18. The plaintiff may recover any specific or any undivided part or share of the premises, though it be less than he claimed in the declaration.

What shall be found in the verdict.

23. If the jury be of opinion for the plaintiffs or any of them, the verdict shall be for the plaintiffs or such of them as appear to have right to the possession of the premises or any part thereof, and against such of the defendants as were in possession thereof or claimed title thereto, at the commencement of the action.

25. When the right of the plaintiff is proved to all the premises claimed, the verdict shall be for the premises generally, as specified in the declaration, but if it be proved to only a part or share of the premises, the verdict shall specify such part particularly as the same is proved and with the same certainty of description as is required in the declaration.

What to be the judgment for plaintiff.

29. The judgment for the plaintiff shall be, that he recover the possession of the premises, according to the verdict of the jury, if there be a verdict, or if the judgment be by default or on demurrer, according to the description thereof in the declaration.

Writ of right, &c., abolished.

38. No writ of right, writ of entry or writ of formedon, shall be brought after the commencement of this act.

In the Supreme Court of the U. States.

HENRY M. BENNETT,
Plaintiff in Error.

vs.

ALEXANDER HUNTER.

Brief of Argument for Defendant in Error.

ROBERT PORTNER & FREDERICK RECKER,
Plaintiffs in Error.

vs.

WM. G. CAZENOVE.

HENRY S. MARTIN,
Plaintiff in Error.

vs.

BEVERLY & SNOWDEN.

The questions arising in these Cases are indentical with those arising in the case of Bennet vs. Hunter, with the exception that the question of redemption is not involved in Portner & Recker vs. Cazenove.
S. F. B.

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY M. BENNETT,
Plaintiff in Error,
vs.
ALEXANDER HUNTER.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

The general question presented by this cause is the validity of a title to land acquired by purchase at a tax sale.

The subject matter of controversy is a large and valuable real estate in the county of Alexandria, Va., sold in 1864 for default, or for alleged default in the payment of the direct tax imposed upon it by the act of Congress approved August 5, 1861. XII. Statutes at Large, 292.

By this act of August 5, 1861, a direct tax of $20,000,000 was laid upon the United States, of which tax, $937,550 66 was apportioned to the State of Virginia.

The act provided the usual machinery for the assessment and collection of the tax, including the usual remedies for coercing payment in cases of delinquency.

Afterwards, on the 7th day of June, 1862, Congress passed another act, entitled "An act for the collection of the direct tax in insurrectionary districts within the United States, and for other purposes." XII. Stat. at Large, 422.

This latter act provides a mode for assessing, levying and collecting this tax in places where the provisions of the former act could not be peaceably executed, by reason of insurrection and rebellion.

The provisions of the act of June 7, 1862, are substantially as follows:

Every piece or parcel of land within any insurrectionary State is charged with such proportion of the entire tax laid upon the whole State, as the valuation of the said piece or parcel bears to the valuation of all the land in the State; and,

in addition thereto, it is also charged with a penalty of fifty per centum of said tax. [Section 1.]

The President is to declare, by proclamation, on or before July 1, 1862, what States are in insurrection, and thenceforth every parcel of land is to be charged with its tax and penalty, and the same are to be a lien upon the land. [Section 2.]

Commissioners, three for each State, are to be appointed by the President to fix the amount of the tax charged upon each lot or parcel of land, and they are to enter upon the discharge of their duties whenever the Commanding General of the United States forces, entering into any such insurrectionary State, shall have established the military authority of the United States throughout any parish, district or county of the same. [Sections 5 and 6.]

Within sixty days after the Commissioners have fixed the amount of the tax, the owner of any lot is required to pay the tax to the Commissioners or into the treasury of the United States; whereupon, the land is to be discharged from the tax. [Section 3.]

Section 4 enacts:

"That the title of, in and to each and every parcel of land "upon which said tax has not been paid as above provided, "shall thereupon become forfeited to the United States; and, "upon the sale hereinafter provided for, shall vest in the "United States, or in the purchaser at such sale, in fee sim- "ple, free and discharged from all prior liens, incumbrances, "right, title and claim whatsoever."

On default in the payment of the tax within sixty days, the Commissioners are required to sell the lands of delinquents at public auction—the sale to be for a sum not less than the tax, penalty, interest and costs, at which sum the land is to be struck off to the United States in the absence of a higher bid;—provision is also made for the redemption of the land after sale. [Sections 7 and 8.]

The further provisions of the act relate to the disposition of the lands struck off by the Commissioners to the United

States—authorizing the leasing and selling of these lands and the payment of the proceeds of the leases and sales into the treasury of the United States.

Such are the leading provisions of the original act of June 7, 1862—its subsequent amendments will be fully noticed hereafter.

Under the provisions of this act, the land in controversy was sold, and was purchased by the plaintiff in error, or by the party under whom he claims, and upon the validity of the title thus acquired depends the decision of this cause.

The defendant in error, who was theretofore the owner of the land, denies the validity of this title upon two general grounds:

I. The sale itself, under the circumstances of the case, was wholly unauthorized, and was consequently void.

II. Conceding that the sale was authorized and valid, the land was redeemed after the sale, and the defendant in error was thereby re-invested with his former title.

AS TO THE VALIDITY OF THE SALE.

The sale was without authority and void for two reasons:

1. Because the full amount of tax, interest, penalty and costs was tendered to the Commissioners before sale.

2. Because the Commissioners sold the whole land when a small portion of it might have been sold for enough to pay all dues and costs.

1. The direct tax for which the land in controversy was liable, was not paid within sixty days from the time when the amount of the tax was fixed by the Commissioners.

It was thereupon advertised for sale; after the advertisement of sale, and before sale was actually made, a tenant of the property tendered to the Commissioners the tax, penalty, interest and cost, for the purpose of preventing a sale. The Commissioners declined to accept the money—proceeded to

make the sale—and sold to the plaintiff in error or the person under whom he claims.

I propose to show that the legal effect of this tender was to deprive the Commissioners of all authority to sell.

Whether or not such was the legal effect of the tender depends upon what was the object and purpose of the sale.

If the object of the sale was merely to raise the unpaid tax, with interest and costs, then the previous payment or tender of the tax, interest and costs, would remove all cause for a sale, and therefore all authority for a sale. A sale under the act is clearly not to be had merely for the sake of having a sale—it is to be had to accomplish some object, and if that object be accomplished beforehand, there is no cause and no excuse for a sale.

What is the object of the sale authorized by section 7 of this act?

This again depends upon the construction to be given to the 4th section, which, as before stated, enacts, that unless the tax be paid within the sixty days, the title to the land shall thereupon become forfeited to the United States, and "*upon the sale hereinafter provided for, shall vest in the United States, or in the purchaser at said sale, in fee simple, free and discharged, &c.*"

In what sense is the land forfeited under this provision? What is the status of the property, as to title, after the lapse of the sixty days, without payment, and up to the time of sale? During this interval, to whom does the property belong, and what are the rights, both of the original owner and of the United States, in respect to it?

For the plaintiff in error it is contended, that the default of payment within the sixty days operates, *ipso facto*, to transfer to the United States the full and absolute title to the whole property—that the forfeiture intended by section 4 is such a forfeiture, that upon default of payment within the time, the property thereupon accrues immediately to the United States and becomes wholly lost to the original owner as a penalty or

punishment upon him for failing to pay, on or before the sixtieth day—and that the "sale hereinafter provided for" is only a proceeding in the nature of a proceeding *in rem*, to enforce the forfeiture and to perfect the inchoate title of the United States.

In other words, under the construction of the plaintiff in error, the sale is a device to get the land, and not to get the tax.

I maintain that no such forfeiture as that claimed by the plaintiff in error was intended by the act. If it were intended, I should maintain that such a forfeiture was beyond the power of Congress.

That Congress may impose a tax upon land, and may subject the land to the payment of the tax, nobody of course denies; but to lay a tax upon land, and subject the land to its payment, is one thing—to lay a tax upon land, and to take the whole land away, as a punishment upon the owner for not paying the tax by a given day, is quite another thing.

This latter is the proposition maintained by the counsel for the plaintiff in error. They claim that Congress, in adopting means for the collection of a direct tax, has the power to enact, that default in the payment of the tax within sixty days from the time it is laid, shall operate, *ipso facto*, to transfer the entire property upon which the tax is imposed, absolutely and irredeemably, to the United States.

A tax of twenty dollars is imposed upon a property worth twenty thousand dollars, and Congress has the power, say the counsel for the plaintiff, to declare, that the whole twenty thousand dollars shall immediately, absolutely and irredeemably become the property of the United States, if the twenty be not paid by a given day.

The argument for the plaintiff in error is, that Congress has all the powers in and about the collection of a United States tax that a State has in and about the collection of a State tax—that a State has power to forfeit lands as a means

of collecting its tax—and that Congress therefore has the same power. If the argument be not faulty, as I submit it is, in claiming the power for the United States, *because* such power pertains to a State, I submit further, that no instance can be found in the legislation of any State where there has ever been exercised or claimed, the power now claimed here for the United States.

The Virginia legislation on this subject, to which the plaintiff in error refers, warrants no inference that any such power was ever claimed in that State.

By an act passed in 1790, certain delinquent lands were indeed forfeited to the Commonwealth, but this forfeiture was declared only after every conceivable means had been exhausted for the collection of the tax, and was at last declared not so much in the exercise of a power to collect a tax, as it was in pursuance of a general policy to open up the lands of the State to settlers.

Moreover, to forfeit land in the manner claimed by the plaintiff would be to take the property of the citizen without due process of law. I waive, however, the discussion of the question of constitutional power, for if the only question involved in this cause were a question of constitutional power, it would be incumbent upon the counsel for the plaintiff to show, in Congress, a power far greater than that involved in the proposition which they labor to maintain. Their proposition, applied to the facts of this case, is this: A direct tax of fifty dollars having been imposed on the land of the defendant in error, of the value of fifty thousand dollars, and payment of the tax having been required within a certain period of sixty days, Congress has the power to enact, that the entire estate, of fifty thousand dollars' value, shall become, at once and irredeemably, the property of the United States, if the fifty dollars tax be not paid within the sixty days.

Great as this power is, it falls quite short of meeting the exigency of the plaintiff's case. The counsel are bound to show, not only that Congress has thus the power to strip the

defendant of his estate for default in payment of the tax, but that *it has the power so to do without notice to him—actual, constructive or presumptive, that any payment whatever is required of him.* For, it will be observed and conceded, the act contains no provision for demand upon the tax-payer—or for notice, of any sort whatever, to him, either of the *amount* to be paid—the *time when* it is to be paid—or *the place where* it is to be paid.

The Commissioners are first to fix the amount of the tax on the several pieces of land—and this they are to do as soon as the military forces shall have cleared any county sufficiently to admit of their opening an office for the transaction of business.

The sixty days within which the taxes may be paid, begin to run from the day when the Commissioners have so fixed the amount; but they are required to give no notice either of the fact that the amount of the taxes has been fixed—or of *when* it was fixed—of *where* their office is, or that they have opened one at all.

To meet the demands of the case, therefore, it is incumbent on the plaintiff to show, in Congress, the power to strip a man of his entire estate for failing to pay a trifling tax within a short period of sixty days—keeping him all the while in utter ignorance of the fact, that any tax has become payable.

In upholding the title of the plaintiff in error to the land now in controversy, the Court must affirm the power of Congress, not only to forfeit for default in the payment of the tax, but also to forfeit where there is no default—from this, there is no escape.

But no such forfeiture as that claimed by the plaintiff in error was intended by the act. Independent of the general consideration that such a forfeiture is totally variant from the declared purpose of the act, the detailed provisions of the act repel all idea of any such forfeiture, and

First. The act declares *expressly* what shall be the *penalty* for non-payment within the sixty days—and what is it? Not

the loss of the whole land by any means, but an additional charge of 50 per cent.—that, *eo nomine*, is declared the penalty. Congress having so declared in terms what the penalty shall be, must be supposed to have declared the *whole* penalty. And how absurd was it, to charge the land with 50 *per cent. of the tax* as a penalty, if *the loss of the whole land* was to be the penalty. Why say to the owner, unless you pay in sixty days your land shall be liable for half as much more, if the object was to take from him the *very land itself*. Why the trouble to impose the paltry 50 per cent., if the design was to appropriate, absolutely, the whole subject.

Second. The fact that the tax is made a *lien* on the land—is itself conclusive against the construction that the United States was to take *the land itself* if the tax was not paid, and as a consequence of the non-payment. Why declare the tax a *lien* on the land, if the intent was to *take the land* in case the tax was not paid. Declaring the tax a lien on the land evidences an intent to hold the land bound and liable for it, and negatives any purpose to claim and appropriate the land itself absolutely.

A lien on land as security for the payment of a claim, and an entire forfeiture of the land for its non-payment, are provisions inconsistent with each other—both cannot stand together—the presence of one excludes the other, and here there is express provision for the former.

Third. The act provides for *two* sales, namely, (1,) a sale of the land on which the tax remains unpaid, and *because* it remains unpaid, and (2) a sale of land which the United States has previously purchased at the *first* sale. (See section 9, *et seq.*) Mark the broad difference in the provisions respecting these two sales. Out of the proceeds of the *first* sale—the *tax sale proper*—the act claims nothing for the United States beyond *the tax, penalty, interest and costs*. The *surplus* proceeds at *this* sale are not required to be paid into the treasury. No provision for that can be found in the act anywhere. The act does not treat the *tax sale proper* as made

for the benefit of the United States beyond its claim for tax, penalty, interest and costs. To anything in excess of that, the United States asserts no demand.*

Quite otherwise is it with the *second* sales directed by section 9, *et seq*. In dealing with *these* sales, the act treats the property sold as absolutely the property of the United States and as sold for its benefit alone. The proceeds of *these* sales are claimed wholly for the United States, and are directed to be paid into the treasury of the United States. At *these* sales the United States is selling its own property—property which it bought at the tax sale, and of course is entitled to the entire proceeds. At the *tax* sale, the land is sold as the *property of the tax-payer* to satisfy a claim of the United States charged upon it. The second sale is a sale of *government property*, acquired by successful bidding at the tax sale.

Fourth. The United States can only acquire title to the forfeited lands by *bidding and bidding highest* at the tax sale. See sections 4 and 7.

Wholly repugnant is this to the theory of the plaintiff in error. If the loss of the land by the owner and the acquisition of it by the United States on default in payment of the tax within the sixty days was intended, it was simply absurd to make the United States compete for the land as a bidder at a public sale.

In case of forfeitures *in rem*, there is indeed usually a sale of the thing condemned, but the sale, in such cases, is the *result and consequence* of title—it is not a means of *acquiring* title by the United States, but a means of enjoying the title *already* acquired. At such sales the United States is not required to be a *successful bidder* to get title. The property is sold as already the property of the United States.

From these features in the act, I conclude that there is no loss of the property to the owner, as a penalty for non-pay-

* That the United States claims, out of the proceeds of the first sale, only the tax, interest and expenses. See Sect. 4, Act of March 3d, 1865, XIII Stat. at Large 502.

ment of the tax within the sixty days. After the lapse of the sixty days without payment, the only change in the status of the property is, that it then becomes liable to be sold for the payment of the tax, with interest and costs.

During the sixty days, the United States can only claim, and, in fact, does only claim the *tax*, and cannot even sell for *that*. After the sixty days, it can and does claim, both tax and interest, and may sell for the recovery of it, with costs. The United States asserts no claim upon, or interest in, the land beyond that; so that the provisions contained in the act respecting forfeiture and sale amount, at last, only to the usual provisions contained in all laws imposing a tax on land, namely, provisions for their sale as a means of collecting the amount imposed.

And this conclusion is confirmed by the further provision, allowing redemption after sale.

Why should the owner be allowed to have back his property on the day after the sale, by payment of the tax, with interest and costs, if the object of the sale was not to realize the tax, with interest and costs.

If, then, such be the whole and sole object of the sale, then the power to prevent a sale by previous payment of tax, interest and costs, as before stated, inevitably follows.

But section 7 of the original act was amended, (XII. Stat. at Large, 640,) and under the amended section, say counsel for plaintiff in error, a sale, after advertisement, may be prevented by payment of tax, interest and costs; but this payment, say they, can only be made by the owner in proper person: They concede that this is *sufficient* to prevent the sale, and they maintain that all this is *necessary* to prevent the sale.

I agree that this is *sufficient*, but I deny that all this is *necessary*. I agree that the payment of tax, interest and costs by the owner in proper person is sufficient to prevent the sale, and I maintain that payment of the tax, interest and costs,

without the personal appearance of the owner, is also sufficient.

If the maker of a note appear to the payee in proper person, and pay him the money, that discharges the note. If he pay the money, without appearing in person to the payee, that also discharges the note just as fully.

So here, the personal appearance of the owner and payment of the tax, &c., prevents the sale. The payment of the tax, &c., without personal appearance, prevents the sale. The efficacy lies in the payment of the money—*wholly* in that and not at all in the personal appearance.

Counsel for plaintiff assume that the amended act has declared it *necessary* that the owner should pay the tax, interest and costs, *in proper person*, to prevent a sale after advertisement.

The amended act does not make this necessary.

Neither the original nor the amended section expressly declares by what means a sale once advertised may be prevented—or that it may be prevented by any means.

Both sections leave this altogether to inference, and there is nothing in either section to support the inference that payment by the owner in person would prevent a sale, unless it be conceded that the object of the sale is what I am claiming it to be. A critical examination of the amended section will show that it does not, *in terms*, give to the payment by the owner in person, the effect of preventing a sale—if it has that effect, (as I concede it has,) it derives it from something else than the *language* of the section—and it can derive it from no other source, except from the fact that it accomplishes the object of the sale.

On the theory of the plaintiff in error, that the sale is merely a proceeding to enforce a forfeiture and vest the title of the property in the United States, if *that* be the object of the sale, there is nothing in the personal appearance of the owner and his payment of the tax to satisfy *that* object, and

therefore nothing in it which, by implication, should prevent the sale.

And here the plaintiff's theory of the nature of the forfeiture may be subjected to a fair test.

Suppose, after a sale is advertised, the owner appears in person and pays the tax, and the sale is thus prevented—*what then becomes of the land?*

According to the plaintiff's counsel, the owner, on default of payment, was divested of all title—thenceforward, *till sale*, the property became and continued, wholly and absolutely, the property of the United States;—when, therefore, the owner comes forward in person, pays the tax, and *stops the sale*, he simply thereby perpetuates his own loss—pays his tax, with interest and costs, and loses his land besides!

Stopping the sale does not change the situation of the title; that, according to the plaintiff's counsel, being in the United States, must still continue to remain there.

Summing up the foregoing comments on the amended section, they amount, in brief, to this:

The amended, like the original section, says nothing as to the manner of preventing a sale once advertised. It leaves the subject just where it stands under the original act. It does not say what shall be necessary or what shall be sufficient, to prevent the sale. If, therefore, under the original act the sale might be prevented by payment of tax, interest and costs, in the same manner it might be prevented under the amended act.

But suppose the act had declared, in terms, that, to prevent a sale after advertisement, payment should be made by the owner in proper person. What would have been the legal effect of that part of it requiring the personal appearance? Would it have had any legal effect? Would not the payment of the money alone have been a full satisfaction of the law? Certainly it would. If the law had required that he should pay with his right hand, would not payment with his left have been sufficient? Undoubtedly it would, because, in

either case, the essence of the requirement is the payment of the money—the doing of the thing required, and not the manner of doing it, is what the law deems material.

If, besides the payment of the money, some other act was to be done for which personal presence was indispensable, the case would be different—but where the personal appearance is required to do an act, which can be done just as effectually without personal appearance, then the personal appearance is immaterial.

But, again, suppose the law had declared that the owner should appear in proper person and pay—and suppose the personal appearance a material part of the requirement, who is an "owner" within the meaning of the term as here employed?

See Dubois *vs.* Hepburn, 10 Pet., page 1, for definition by United States Supreme Court of an "owner" for the purpose of redemption, after a tax sale.

"Any person who has any interest in the land * * * * is the owner thereof for the purpose of redemption—any right of entry upon it, to its possession or enjoyment or any part of it, which can be deemed an estate in it, makes the person the owner for purpose of redemption."

Such is the Supreme Court's definition of an owner, for the purposes of a redemption, *after* sale and after some rights have accrued to a purchaser. Certainly the defifiition will not be narrower for an "owner" *before* a sale and for the purpose of preventing a sale, before any rights of third parties have accrued.

Under this definition, then, the "owner" did appear and make the tender in proper person, the tender having been made by the tenant in possession—and thus the law was fully satisfied, even on the most extreme hypothesis as to its requirements.

I sum up the whole of this branch of the argument as follows:—The act of June 7, '62, provides for no forfeiture *in rem* or common law forfeiture of the land.

Such forfeitures for default in the payment of a direct tax on land are beyond the power of Congress; if they were not, they are clearly not designed or intended by the act.

The sole object of the "sale hereinafter provided for" is to recover the tax, with interest and costs—and such being its object, the sale may always be prevented by paying beforehand the tax, interest and costs. This payment need not be made by the owner in person. The amended act does not require it—if the amended act did require it, the requirement in respect to the personal appearance would have no legal effect—and if the amended act did require it and the requirement were material, there *was* personal appearance of the owner.

It is to be observed, that there was tender of payment and refusal of the Commissioners to receive it. I assume that tender of payment is equivalent to actual payment, so far as either has any bearing on the validity of the sale.

See Hepburn *vs.* Auld, 1 Cranch 330, if authority is necessary, that tender and refusal are equivalent to performance.

The unlawful refusal of the Commissioners to accept the tax when tendered, cannot be made the foundation of a valid sale.

I conclude this branch of the argument by calling attention to the last proviso of section 7—as confirmatory of the conclusions stated above.

This proviso specifies three grounds on which the Commissioners' certificate of sale may be impeached, as evidence of the regularity and validity of the sale:—one of which is, proof of *payment previous to sale.* Payment *previous to sale,* it is to be observed, is the language—not payment *within the sixty days.*

2. The sale by the Commissioners in this case was void, because they sold the whole land, when the tax, &c., might have been realized by the sale of a part, and that a very small part.

The act directs a sale of the land, and is silent as to the quantity—it does not say the "whole" land.

"Where the statute was silent as to the quantity which might be offered and sold to pay taxes, the Supreme Court of Indiana held, that, upon general principles, a sale of a greater quantity than was necessary to satisfy the tax * * * * was illegal and void." Blackwell, pp. 287, 288, citing 2 Blackford, 421.

If this be the law, then the Commissioners sold, in these cases, *without any authority to sell*:—They exceeded their authority, which was equivalent to acting without authority. Blackwell, p. 437, *et seq.* Chapter *Excess or Abuse of Authority.*

But the plaintiff in error shelters himself here, under the effect which is given by the act to the certificate of sale.

The direct enactment on this point is, "which said certificate shall be received in all Courts and places, as *prima facie* evidence of the regularity and validity of said sale, and of the title of the said purchaser or purchasers under the same."

This enactment simply shifts the burdens of proof, but does not in any degree dispense with that strictness in the execution of the power which has always been held necessary to a good title under a tax sale.

Any irregularity in the execution of the power has the same effect under this enactment that it always had—proof of it is cast on him who contests the tax title—that is all. Proof of the absence of an authority to sell will destroy the tax title, notwithstanding *this* enactment.

But the direct enactment respecting the force of the certificate as evidence, is qualified by a proviso, the last proviso in section 7, "that the certificate * * * shall only be affected as evidence of the regularity and validity of the sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed," &c.

(The province of a proviso to a statute is not to enlarge

the enacting clause; it can only restrain, qualify, or explain it. 1 Scammon 259, 4 Scammon 352, 19 Ver. 129.)

The plaintiff in error claims that this proviso makes the certificate conclusive evidence of a perfect title, except against proof that the land was not subject to taxes, or that the taxes had been paid, or that the land had been redeemed.

In the absence of any enactment specially on the point, two things are necessary to make the title acquired at a tax sale good, viz: 1st. The Commissioners must have authority to sell; and 2d. The sale must be conducted strictly according to the mode prescribed.

On the claim of the plaintiff in error as to the effect of this proviso, it would result, that however unauthorized, for other causes, the action of the Commissioners might be in making a sale, the owner would be prevented from showing this absence of authority, unless it grew out of the fact, that the land was not subject to taxes, or that the taxes had been paid. The Commissioners might lack authority to sell for other than these two reasons. Suppose, for example, they were to sell at the expiration of ten days, instead of waiting for the expiration of the sixty—that would clearly be a sale without authority. Yet the title acquired at it would, neve r theless, be good, under the certificate, if the certificate has the effect claimed, and thus a sale by a public officer, having no authority to sell, would carry a perfect title.

Such legislation, in the language of Judge Caton, (Curry *vs.* Hinman, cited in Blackwell, 81,) would be "nothing less than a moral fraud"—"the monstrous injustice of such a law is too glaring to admit of that construction, if one more just and reasonable can be given to it."

That the statute might provide, that an irregularity in the mode of conducting the sale should not vitiate the title, may be very readily admitted—but that the statute should further provide, that the absence of authority to sell should not vitiate it, is simply monstrous.

See Blackwell, page 79 *et seq.* Chap. "*Of the onus probandi*,"

for collection of decisions on statutes giving certain conclusive effects to tax deeds, &c.

These decisions clearly indicate the opinions of the several Courts by which they are made, that any attempt to make the tax deed conclusive evidence of the *authority to sell* would be vain. To hold otherwise would be to hold, that the legislature may take the property of A and give it to B.

These decisions also show on what slight things the Courts will seize to construe a statute as not intended to have such effect.

Thus, where it had been enacted that a tax deed should be conclusive evidence of the "*regularity and legality of the sale*" it was held, (Garret *vs.* Wiggins, 1 Scammon.) that this had reference to the mode of conducting, and not to the authority to make the sale.

A "regular and legal" sale under a tax law, does not therefore necessarily import a good title, according to the spirit of these decisions—because a "regular and legal" sale does not necessarily imply an authority to sell—and without that, a "regular and legal" sale carries no title.

In the light of these decisions, I ask special attention to the phraseology employed in this act.

The direct enactment declares, that the certificate shall be *prima facie* evidence of the "regularity and validity of the sale and of the title of the purchaser." The proviso speaks of the certificate, as evidence of the "regularity and validity of the sale," omitting the words, "and of the title of the purchaser."

The employment of these last words in the direct enactment, and their omission in the proviso, is not an immaterial circumstance.

If "regularity and validity" in the sale necessarily implied a perfect title in the purchaser, then the words "and of the title of the purchaser" were pure tautology. But this is not to be presumed, under any circumstances, and especially not,

where such a presumption would make the proviso productive of the consequences above stated.

Here, then, it is implied that there may be "regularity and validity" of sale, and yet not a title in the purchaser; and this can only be explained by construing the expression "regularity and validity" to have reference to the mode of conducting the sale—that it does not include the authority to sell, which is, also, requisite to a perfect title. Thus the effect of the proviso is, not to shut out proof of the absence of authority, from whatever circumstance such want of authority may result—but only to exclude evidence of irregularity in conducting the sale.

If the position of the plaintiff in error be a true one, then the Commissioners might fill up and sign a certificate of sale—and, without advertising a sale—or without having a sale—or without even laying the tax, by the mere issue of this certificate might strip a man of his property forever.

But all difficulty—if any—arising under this proviso, is removed by the Joint Resolution of February 25, 1867, (XIV. Stat. at Large, 568,) section 6:—repealing certain previous amendments of the direct tax law, and declaring, that "certificates of sale shall be received, in all Courts and places, as *prima facie* evidence of the regularity and validity of said sale, and of the title of purchaser or purchasers under the same, as provided in section 7 of the act * * * approved June 7, 1862."

This declaration, as to the legal effect of the certificate, operates to repeal all previous inconsistent declarations on that subject, and thus repeals the proviso* now under consideration.

Summing up this branch of the argument, I submit that the Commissioners (supposing they had any authority to sell)

*NOTE.—The act of June 7, '62, with its amendments, was before the United States Circuit Court for the Eastern District of Arkansas, in case of Washington L. Schenck vs. Gordon N. Peay et al. An abstract of the points decided is reported in "Internal Revenue Record, August 14th, 1869, Vol. X, p. 54."

had authority to sell only so much as would pay the tax with interest and costs. This was the limit of their authority, as much so as if that limit had been prescribed expressly. They had no authority to sell the whole property. In selling the whole property they sold without authority—this absence of authority rendered their sale void, and we are not precluded from showing this want of authority, by any effect which the act gives to the certificate as evidence.

AS TO THE REDEMPTION OF THE PROPERTY.

The property was redeemed according to the provisions of the act.

The redemption took place under the second proviso of section 7, viz: "If the owner of said lots of ground shall be a minor * * * * or a person under a legal disability, the guardian, trustee or other person having charge of the person or estate of such person, may redeem the same at any time within two years after the sale thereof, and in the manner above provided and with like effect.

Hunter, being a minor at the time of sale, was entitled to the benefit of this proviso.

The manner of redeeming is prescribed in the first proviso of section 7, as follows, viz:—the owner is to appear before the Commissioners—take an oath to support the Constitution of the United States—and pay the tax, penalty, interest and costs.

All this was literally done by Hunter within two years from the sale.

That Hunter was an "owner" of the property, for the purposes of redemption, is submitted as clear, under the decisions referred to.

His title was derived under the will which devised the place to B. W. H. (the father) until A. H. (son and defendant in error) should be twenty-one—and then to A. H. (the son) in fee. Should the son die before twenty-one, then to the father in fee.

The son wanted only four months of being twenty-one when the land was sold.

His estate was a contingent remainder in fee, to vest in possession on his attaining twenty-one. That such a contingent remainder is an "estate"—a subject of alienation, voluntary or involuntary—see 2 Washburne's Real Prop., marginal page 237, and any elementary work on real estate. To all human calculations, the son had the chief interest in seeing that the land was not lost. The father had a *certain* estate in it, for four months only, and the son, if then alive, was to have it forever, absolutely.

A state of facts, easily supposable in this case, will fairly illustrate the positions taken by counsel for plaintiff. It is understood that they deny Hunter (the son) to have been an "owner" of the land, for the purpose of redemption, because the whole fee was not absolutely in him at the date of the sale.

Suppose he had come of age on the day after the sale.

Suppose the sixty days had passed without payment of the tax, nobody knowing that any tax had been laid, and the land is advertised for sale.

B. W. H., the father, is physically unable to appear before the Commissioners and pay the tax, interest, costs, in person, and A. H., the son, is not allowed to pay, because, they say, he is not the "owner." In that case, both father and son would both be bound to stand still and see an estate worth $50,000 (as this, in fact, is) sold and hopelessly lost to them, because of the non-payment of a $50 tax, and that, too, when both are ready to pay it, and actually begging the tax-collectors to receive it!

Hopelessly lost, I say, because it cannot be redeemed after the sale—not by the son, because he was not an "owner" at the time of the sale; and not by the father, because, on the supposition, he has no longer any interest to redeem.

The person who applied to redeem, in this case, being an "owner" within the meaning of the statute, and having made

application within the time prescribed, and having complied, literally, with the terms of redemption as set out in the first proviso of section 7, the property was redeemed, and the title of the tax purchasers, conceding that it had, up to that time, been valid, was then and thereupon extinguished.

It is objected, however, by the counsel for plaintiff, that the act of March 3, 1865, imposed additional conditions of redemption, (see section 7 of that act, first proviso,) and that the applicants did not perform these conditions. That is true, but the applicants were not bound to perform the additional conditions imposed by the act of 3d of March.

The additional condition of redemption imposed by this act is an oath, by the applicant, that "he has not taken part with the insurgents in the present rebellion, or in any way given them aid or comfort," and proof, satisfactory to the Commissioners, that the "said oath is true."

The act of March 3d, containing the above provision, was passed *after* the tax sale in these cases, and *before* the period allowed for redemption, by the former law, had expired.

To treat the act of March 3d as applicable to these cases, would be to make it retro-active in its operation.

Such operation is not to be taken as intended, unless the express terms of the act make it so, and these terms are clear and unequivocal. Sedgwick on Con. and Stat. Law 194–5, and other pages referred to in index, and Blackwell 480.

The *first* section of the act is, in express and unequivocal terms, made retro-active—the absence of such terms in the seventh section would imply, positively, a different intent with reference to that.

Again, *after* sale and *before* the expiration of the period of redemption, to impose a *new* condition of redemption, presupposes the right and power to take away the privilege of redemption altogether.

The Government says: if you fail to pay the tax, your land shall be sold, but not irredeemably; you may buy it back again, within two years, by paying the tax, with interest

and costs. Relying on this, the citizen, through inadvertence or other causes, suffers his land to be sold, knowingly—having the pledge of the Government that he may afterwards redeem it, by payment of a trifling amount; but immediately after the sale, and before the time of redemption has expired, the Government, by a fresh act, says he shall not redeem at all, or what is the same thing, imposes new conditions of redemption, not existing at the time of the sale, which he is unable to perform.

This would be a breach of faith, not to be imputed to any legislative body, if their act would possibly admit of any other construction. The first proviso of section 7 of the act of 1865, is made fully operative by construing it as *intended* to apply, only, to those sales made after its passage.

The right of redemption under the act of Congress was a vested right—it was property, and as such, guaranteed to the owner against loss except by due process of law. It was not a gratuitous privilege to be taken away at any time—it was an inseperable incident to the sale. If, after the period of redemption had expired, a *further* time had been allowed for redemption, such a privilege would have been gratuitous and might have been taken away at any time, for this would not have been an incident to the sale. But the right to redeem, attached to the sale, was property, and to deprive one of it unless he made oath that he had not committed a crime, would be to punish him with loss of property without conviction or trial.

Congress or a State Legislature, in providing for the sale of delinquent lands, may not be bound to attach to the sale a privilege of redemption—but where that privilege has been attached to the sale, and the sale has been accordingly made, the power to annul the privilege without, at the same time, annuling the sale, is, at the least, doubtful.

On the foregoing, I submit, that the first proviso of section 7 of the act of '65 (XIII. Statutes at Large 502) was not *intended* to affect rights of redemption *then* existing, that if so

intended, there was no *power*, after a sale, to attach to them the performance of a new condition—and that if there was power to attach *any* new condition, there was none to attach such a condition as the one thereby prescribed.

But if all this were not so, the pardon of Hunter rendered the new condition inoperative as to him.

The first of the series of acts coming under review, in this case, is the act of August 5th, 1861—"To provide increased revenue from imports, &c."

By that act, a direct tax is imposed upon the United States, to be assessed and laid upon real estate. Very careful and detailed provision is made for assessing and collecting the tax. Every line shows the special desire of Congress to collect the tax with the least possible hardship to the citizen.

Next to the collection of the tax, the design of Congress to guard the citizen against oppression, is most conspicuous.

The act of June 7, '62, and the acts amendatory of that act, are really part and parcel of the act of August, '61—as much so as if they were actually incorporated in it. They are auxiliary to the main purpose of that act—they were passed in the prosecution of the same design, viz: the collection of the tax, and they are to be construed and administered so as to make them effective for that purpose, and in the evident spirit of the main act.

The counsel for the plaintiff, whilst disclaiming it in terms, nevertheless proceed, in fact, upon the theory that these acts, though nominally intended for the collection of a tax, were really intended to confiscase the property of disloyal citizens —that under color of collecting a tax, the main purpose was to punish for disloyalty—and they, therefore, construe and apply the acts in such way as to make them most effective as penal enactments. (On this point see Blackwell pp. 29, 30.)

Such indirection is not to be imputed to any legislative body. It is to be presumed, that when Congress intends to confiscate property for crime, it will declare its intent in terms which are unmistakable.

But in a mere revenue act there *can* be no distinction of persons—and, particularly, where the act imposes simply a tax on lands,

Tax laws must be uniform in their operation—they cannot operate upon one citizen in one way, and upon another citizen in another way, because of any difference between them, actual or supposed, in a moral point of view.

A man who has committed murder—with or without conviction—cannot be subjected to heavier burdens, under a revenue act, because of his crime; he cannot be subjected to harsher or more stringent requirements, in the matter of redemption or otherwise—his land, if taxed, must be taxed just as it would be, if he were innocent of every offence—process for coercing payment must be the same, in either case.

So, the present acts must have the same construction in reference to all persons—they must operate alike on loyal and disloyal—whatever construction could be given to them in favor of a soldier of the United States in the late rebellion, the same construction must be given to them in all cases whatsoever, so far as their construction is influenced by the character of the person alone.

S. FERGUSON BEACH,
Of Counsel for Defendant in Error.

January 10, 1870.

16-196

In the Circuit Court of the United States

FOR THE

DISTRICT OF VIRGINIA.

NOVEMBER TERM, 1870.

HUNTER *vs.* McCABE
AND
DIXON *vs.* TACEY
} *Ejectment.*

POINTS OF COUNSEL FOR PLAINTIFFS.

Judd & Detweiler, Steam Job Printers, corner of Penn. ave. and 11th st.

In the United States Circuit Court,

DISTRICT OF VIRGINIA.

B. W. HUNTER
vs.
F. McCABE,
and
M. J. DIXON
vs.
J. TACEY.
} IN EJECTMENT.

POINTS OF COUNSEL FOR PLAINTIFFS.

1. An offer to pay the tax before sale and refused by the commissioners, because not made by the owner in person, renders a subsequent sale by the commissioners void. (Bennett *vs.* Hunter, 9 Wallace.)

In the case of Dixon *vs.* Tacy, the testimony establishes such offer and refusal.

2. If the tax, though not actually offered, would have been offered and paid before sale, but for the known refusal of the commissioners to accept any offer when not made by the owner in person, then the sale by the commissioners was void.

In the case of Martin *vs.* Beverly and Snowden, argued and decided at the same time with Bennett *vs.* Hunter, and which the Supreme Court, in its opinion, stated was not distinguishable in principle from the latter, the statement of the record on this point was, (*see page* 15 *of the Transcript*,) that a friend of the owner went to the office of the commissioners prepared to pay the tax, but made no tender of it, being informed that the tax would not be received, except from the owner in person.

That the commissioners could make no valid sale for non-payment of the tax where such non-payment resulted from a

known impossibility of making payment, occasioned by the unlawful act of the commissioners themselves, is submitted as a proposition not requiring argument. Indeed, this is the precise proposition affirmed in the decision of Martin *vs.* Beverly and Snowden.

The present case of Hunter *vs.* McCabe differs in no essential particular as to the facts, in this connection, from the case of Martin *vs.* Beverly and Snowden. In both cases the proof shows no actual tender or offer of the tax; in both cases it shows there was a party prepared to pay; in both cases that the party, so prepared, was apprised that the commissioners would not have received the tax, even if formally tendered by them.

The two cases differ in this, viz: in the case of Martin, the party prepared to pay went to the office of the commissioners; in the case at bar, the party prepared to pay did not go to the office of the commissioners. This is an immaterial difference, for it cannot be doubted that the decision in Martin *vs.* Beverly and Snowden would have been exactly as it was, though the proof had not shown that the "friend prepared to pay" went to the commissioners' office, if it also appeared that his failure to go was because of his knowledge that payment would not be received from him. His going or not going to the office of the commissioners was immaterial, if there was ground for believing that the preparation to pay was rendered of no avail, because of the course of action laid down by the commissioners.

The proof, in the present case, that Mrs. Hunter, the wife of the plaintiff, would have paid the tax, and have saved the property from sale, is necessarily circumstantial. She cannot be heard herself in the case, being incompetent to testify. As appears by the evidence, she must have known the land was advertised to be sold as forfeited; that the payment of the tax of twenty-seven dollars would save it; and she knew positively that the commissioners would not receive the tax except from her husband, who was absent. She had the means of paying the tax, and the only real obstruction to its payment was the unlawful ruling of the commissioners. To what then is the non-payment of the tax to be attributed? It can be only to one or the other of two things—either to the known

refusal of the commissioners to accept the tax from her, or to an indifference upon her part to the loss of the property.

The proof shows that, with respect to another estate, "Abingdon," advertised for sale, side by side, with the estate in controversy, and for the same cause, she was anything but indifferent to its loss, and resorted to all available means to save it.

Shall it be doubted that she was equally concerned for "Brookdale," and is such doubt only to be dispelled by producing a witness to testify that he knew she would have saved Brookdale, if she could?

3. The rule and practice established by the commissioners not to accept the tax upon property whilst advertised for sale under the seventh section, unless tendered by the owner in person, of itself nullified all sales made by them. Having shown that such a rule and practice were, in fact, established, it is not necessary that one contesting the validity of a tax sale should show any fact beyond this:

By the terms of the act of June 7, 1862, (12 Statutes, 422,) an opportunity of paying the tax is provided for the property owner, before his property becomes liable to sale.

A period of sixty days, from the time of fixing the tax, is given him before his property is even liable to be *advertised* for sale; and, after advertisement, the act still gives him the opportunity to pay and save his property at any time before sale is actually made.

The opportunity to pay, provided by the act, was the right to pay at any time, and by the hands of any person whatever, from the day of the fixing of the amount of tax down to the moment of sale. About this there is no dispute.

Now, the foundation of every valid sale for non-payment of taxes, is the *default* of the owner; if there be *no* default on the part of the owner, his property cannot be sold rightfully.

But there *can be* no default on the part of the owner, unless the opportunity of payment allowed by law has been first accorded to him, and he has, *notwithstanding*, suffered the tax to go unpaid.

For illustration, suppose the commissioners under the act,

without waiting through the period of sixty days, had advertised and sold at the end of thirty days; such a sale would have been void—confessedly so, I assume; and it would have been void, because the opportunity allowed by law to the owner for payment would not have been accorded to him. No default could be imputable to him until this opportunity had been first fully enjoyed by him, and had been suffered to pass unimproved; and, there being no default on his part, there could be nothing to give authority for sale.

I submit it as a propcsition not requiring argument, that a denial to the owner of property of this opportunity of payment, out and out, *in toto*, would invalidate any subsequent sale of it for supposed default; as for example, if the commissioners, on the very day of fixing the amount of the tax, should at once advertise and sell the property, because of the non-payment of the tax, waiting not at all for its payment.

I submit this as one of the axioms of this case.

Assuming this proposition to be sound, I submit as a further proposition, that this opportunity of payment is a privilege in its nature, entire—not divisible—not susceptible of being enjoyed in part, and denied in part, but of such a nature that a denial of it in part is equivalent, *ex necessitate rei*, to a denial of it altogether.

I have supposed the commissioners to advertise and sell at the end of thirty days, instead of waiting till the end of sixty, and have assumed that such a sale would be confessedly void. Would not the result be the same, if they advertised and sold at the end of forty days, or at the end of fifty days, or at the end of fifty-nine days? The same undeniably.

The man who pays his tax on the sixtieth day, satisfies both the letter and spirit of the law, as completely as the man who pays on the first day. The denial of one day out of the sixty can no more be allowed than the denial of two, or of three, or of ten, or of fifty-nine. For if *one* may be denied without invalidating a sale, where are we stop? Obviously we cannot stop anywhere short of allowing that the whole sixty may be denied, and yet a sale be good. But this is contrary to my

axiom. A denial of the whole sixty would invalidate a sale, so then, must the denial of one day, and hence it follows, that a denial of one day is equivalent to a denial of the whole sixty—a result which can only come from conceding that this opportunity of payment *is a privilege in its nature entire and indivisible*—Q. E. D.

If this opportunity of payment be a privilege in its nature entire, it must and will be admitted, that when we show a denial of it in any part, the same consequences follow, as when we showed a denial of it out and out, altogether; this necessarily and inevitably results from its *entire* character. It is so of everything which is entire—as an entire condition—an entire contract, &c.

An entire condition, unperformed in part, is unperformed altogether; so of an entire contract. And this is not a legal fiction, but a legal and practical reality, because the part unperformed may be that which gives value to the whole, as here, that part of the privilege denied, may be the very part required for satisfying the requirement of the law.

Did this rule and practice established by the commissioners operate as a denial, in any part, of the opportunity of payment provided by law?

This opportunity of payment, as before stated, consisted in the right to pay within a given period of time, and also in the right to pay by the hand of any person whatever: this is agreed.

Now, there may be a denial of this opportunity, as well by unlawfully restricting the *manner* of payment, as by unlawfully restricting the *time* of payment.

If the commissioners were to adopt and enforce a rule by which no tax was to be received after the expiration of *thirty*, instead of sixty days from the time of fixing it, a sale of land as delinquent, under the operation of that rule and practice, would be void, on the foregoing reasoning; there would have been a denial of half the period given by law for the payment.

If the commissioners were to adopt and enforce a rule by which no tax was to be received unless tendered by a person of

a particular age, or of a particular color, or by the owner in person, when the opportunity provided by law is the privilege of paying by the hand of any person whatever, without regard to age, or color, or ownership, here would be a denial of the opportunity of payment as clear and palpable and substantial as where it consists in denying some portion of the *time* allowed by the law.

The opportunity provided by law is a privilege of paying in any manner whatsoever. The opportunity as accorded by the commissioners is the privilege of paying in one particular and specified manner only.

Under the law, the owner, at any time before sale actually made, may send the tax to the commissioners by his agent, by his wife, by his friend, by anybody. He sends the tax in one of these modes; the commissioners refuse to receive it, unless he brings it himself, which it is too late, perhaps physically impracticable for him, to do. Is not this a denial to him of the opportunity of payment, as clear and as material as where he is denied thirty days out of the sixty?

A denial of one of several *modes* of payment cannot be distinguished, in principle, from a denial of one of several *days* of payment. A denial of every *mode* but one cannot be distinguished from a denial of every *day* but one. A denial of one day is equivalent to a denial of the whole sixty, and will avoid a sale, and so a denial of one method is equivalent to a denial of all methods, and will likewise avoid a sale. And note, that here there was a denial of every method but one.

The commissioners, as appears by the evidence, in administering the act of June 7, 1862, adopted, in advance, and enforced it as an inflexible rule not to accept the tax on property whilst advertised for sale under the 7th section, *unless tendered by the owner in his own proper person.* If tendered by his wife, or his friend, or his agent, or by a stranger, under the established rule, it could not be received; the property must be, and was, treated, as delinquent, and was sold accordingly.

Here was a denial to all owners of property, in a very important and substantial particular, of the opportunity provi-

ded by law for the payment of the tax; this, surely, will not be disputed.

But this opportunity of payment being a privilege in its natnre entire, a denial of it in any part, as we have seen, is a denial of it altogether, and thus we are brought back to the question, can any sale for non-payment of taxes be valid where the opportunity of payment allowed by law has been wholly denied to the owner?

I have already submitted, and again submit, that the negative answer to this question must be granted as an axiom in this case.

The principle upon which the law holds that a privilege, or a contract, or a condition in its nature entire, cannot fail in part and avail in part; but, if failing in any part, must be treated as having failed altogether, has been already adverted to. It is that the part in which it fails may be the very part required to make the privilege of any value, or to give any value to performance.

The correctness of this principle was never more clearly or powerfully illustrated than in this case, and it is not easy to conceive of another case, in which justice could more imperatively demand its application, for the following are the facts in the case:

The tax commissioners having entered upon the discharge of their duties, in Alexandria, in June, 1863, fixed the amount of tax upon the several pieces of property in the city and county on the 14th of Sptember following; the period of sixty days commenced to run on that day, (September 14, 1863,) and it commenced, continued, and expired, without any notice being given by the commissioners, actual or constructive, * that any tax at all was payable. The act itself, under which the commissioners were appointed, gave no information whatever upon the subject.

The commissioners sat passively in their office during the

* The short advertisement of September 11 was not even constructive notice, being unauthorized by law. It was, at most, a mere act *in pais*, and, at that, gave no intelligible information even to such as may have seen it.

whole period, receiving the tax from such few persons as, by accident, knew that the tax was payable; neither going out themselves, nor sending out, to leave any notice of the tax, or to make any demand for the tax, either upon the premises respectively liable for it, or in any place, or upon any person.

As might be supposed, the sixty day passed with very few payments of the tax; but immediately thereupon, the commissioners proceeded to advertise for sale, as forfeited for the nonpayment of the tax, all the property on which the tax had not been paid, describing each piece, and stating the amount of the tax thereon and the penalty.

Thus the first information of an official character given to the public in regard to this tax, was, that nine-tenths of the entire property of the city and and county had become forfeited and liable to sale, and was to be sold, because the tax had not been paid; and when the agents, relatives, and friends of absent owners crowded forward to pay the tax and save the property from sale, they were told by the commissioners that the tax could not be received from them, that the owner must himself come, in his own person, to their office, and pay it with his own hand; that no other mode of payment was allowed or allowable.

Such are the undisputed facts of the case, and being such, must it not be granted that this denial of the privilege of payment, except it should be made in one particular manner, was *practically*, as well as in law, a denial of it altogether? The mode of payment required by the commissioners was just the very mode which it was impossible to adopt, and was exactly equivalent to an absolute denial, altogether, of the privilege of making payment.

But, it may be suggested, it is not enough to invalidate a sale, to show that there was this general denial of the privilege of payment; you must show, that notwithstanding this denial, you actually made the attempt to pay, and that your attempt failed because of the rule established by the commissioners, for *non constat*, that this rule and practice, so established, prevented the payment; the failure to pay *may* have resulted from inability or

unwillingness to pay, and the tax *might* not have been paid, even though there had been no denial by the commissioners.

That this suggestion is not sound is apparent, whatever be the test applied to it. Test it by reference to analagous cases; take the case, say of a sale made at the expiration of thirty days instead of sixty. Such a sale would be held void upon the simple proof, that we were denied half the time allowed by law for payment. Proof of that alone would be sufficient. Yet in this supposed case, it might be suggested with like truth and force, as in the case under consideration, that the failure to pay the tax *might* not, in fact, have resulted from the want of the time within which to pay it; it *might* have resulted from inability or unwillingness to pay, and we might, in such a case, with equal propriety and reason, be required to prove, that had the full time been allowed, the tax would *then* have been paid.

Suppose, again, that the commissioners, directly after fixing the tax, had died or resigned, or had refused wholly to act, and that a new commission coming in at the end of sixty days, and finding all the taxes then unpaid, had proceeded forthwith to advertise and sell every lot of ground in the county, such sales would be confessedly void, and it would be sufficient to avoid them to prove that, throughout the whole sixty days, payment was absolutely impossible for want of commissioners to whom to pay; but in this case also, the suggestion would lie that the failure to pay might not in fact have resulted from the want of any person to receive the tax; that even had the commission continued full, the tax *might* not have been paid, and that proof should further be required to show that had it been full the tax then would have been paid. The suggestions in the cases supposed would be manifestly unsound, and so, for the same reasons, it would be in the case in judgment. The true principle is this: as the law does not require impossibilities, so it does not require any *attempt* at impossibilities.

When, in the present case, we show that the unlawful action of the commissioners rendered it impossible to pay the tax in the manner allowed by law, we are not compelled to show further an attempt, notwithstanding, to perform the impossi-

bility. We cannot be subjected to the double requirement of showing, first, the impossibility of payment, and, second, that but for the impossibility, payment would have been made.

"Any one bound to do a particular thing must either do it, or offer to do it, and if no objections are made, he must show he made the tender in a regular manner; but this is not necessary, if the other party by his conduct dispenses with a regular tender, as by a previous refusal to accept it, &c. After an offer of performance and a refusal of acceptance, it is not in the power of the opposite party to say, that he who made the offer would not, or could not have done what he declared himself ready to do."

Blight *vs.* Ashley *et al.*, 1 Peters C. C. R., 15.

Having shown a general and inflexible rule established by the commissioners, which was an absolute refusal in advance, in all cases, to allow payment of the tax in the only manner, which, under the circumstances, was possible, we cannot be held to show a special refusal in this special case; proof of a precedent general and unqualified refusal in all cases, is equivalent to proof of a special refusal in every special case.

Summing up, in brief, the argument on the third point made in these cases, I say, that no valid sale of land for non-payment of the tax can be made under the act of June 7, 1862, unless and until the opportunity of payment, provided by the act, has first been accorded to the owner; that the *default* of the owner is the *foundation* of the authority to sell, and there *can* be no default on his part until he has been allowed the opportunity of payment provided for him; that this opportunity is a privilege in its nature entire, and not susceptible of division, so that a denial of it in any part is equivalent to a denial of it *in toto;* that the restriction upon the mode of payment, unlawfully imposed by the commissioners, *was* a denial of this privilege in a most essential part; that no default whatever can be predicated of the owners of the property, and that the sales, therefore, rest upon no foundation.

4. The commissioners had no authority to sell the land to the

defendant (in Hunter *vs.* McCabe) for less than two-thirds of its assessed value, and having done so, the sale to him was void.

The language of the statute is, (12 Statutes, 640,) that under the circumstances appearing in this case, the commissioners "*shall be authorized*" to bid off the property to the United States at a sum not exceeding two-thirds its assessed value, unless some person shall bid a larger sum. Under this provision, the commissioners are "*authorized*" to force up the biddings on all property as high as two-thirds the assessed value, and to bid it off for the United States at any price below that limit.

The words "*shall be authorized*" are mandatory, and under their proper legal construction the commissioners were *bound* to do what, by the words of the statute, they are "*authorized*" to do.

"Where power is given by statute to public officers in permissive language, as that they may, if deemed advisable, do a certain thing, the language used will be regarded as peremptory, where the public interest or individual rights call for its exercise."

Supervisors, &c., *vs.* United States, 4 Wallace, 435.
Mason *vs.* Fearson, 9 How., 259.

In the present statute, a power is given in permissive language to public officers. Did either the public or individual rights and interests call for its exercise?

The court of appeals of Virginia, in Smith *vs.* Turner, (18 Gratton, 839, 840,) in considering this question, held that the policy of the Government required the exercise of this power; and whether this be a correct view or not, it is clear that the individual owners of property were especially interested in calling for its exercise.

It was of the first importance to them that their property, if sold, should not be sold for a song; that the surplus over the amount due to the Government for taxes and costs should be the largest possible, and that the commissioners therefore should be required to run up the property so long as there was a competing bidder.

This is undeniable, unless, as formerly claimed by the supporters of the tax titles, the property, on failure to pay the tax, became absolutely and beneficially the property of the United States, and wholly lost to the owner, so as to leave him no further right either to it or to the proceeds of its sale. But this view was exploded by the decision in Bennett *vs.* Hunter, and is contradicted by every provision of the act itself.

That the United States has no right and makes no claim to anything out of the proceeds of sales *under the 7th section*, except the tax and the costs, &c., of its collection, I am content to rest upon an inspection of the act itself, referring, however, at the same time to brief for defendant in error, page 3 to 10, in Bennett *vs.* Hunter. And that any attempt to absorb the entire subject, even if intended, would be vain, see Griffin *vs.* Mixon, 38 Mississippi, 424, for a masterly opinion condemning totally the only known instance of such an attempt.

It is not correct to say, as has been said for the tax title, that it makes no difference to the owner who is the purchaser, so the property is sold. It *does* make no difference to him, where the sale is made for more than two-thirds the assessed value, but where the sale is for a price below that limit, he *is* concerned that the United States shall be the purchaser, because, if sold to any other party below that limit, it is necessarily sold for a less price than if sold to the United States. The property may be utterly thrown away and sacrificed, unless it be held that the commissioners are bound to run it up against all competing bidders; and can any conceivable reason be assigned for this two-thirds clause in the act, except that unreasonable sacrifices of property would thereby be prevented?

This was obviously its only purpose, and this purpose is plainly defeated, unless the permissive words are construed as mandatory.

These views are submitted as the views which ought to govern in all cases where there is a sale of the *entire property*, and if, as contended by the tax-owners, the act requires a sale of the entire property in every instance, without regard to the practicability of selling a part, then these views should govern in every case.

5. But I maintain that under the act the commissioners had no authority to sell the whole land where a part would suffice to pay all dues, and could be conveniently cut off and sold by itself, as clearly might have been done in the case of Hunter *vs.* McCabe, the property consisting of four hundred acres of land assessed at $10,000, and sold at the tax sale for upwards of $5,000.

For the argument on this point, I refer again to the brief in Bennett *vs.* Hunter, p. 15.

I refer also to the same brief, pp. 15 to 18, for the argument, that we are not precluded from showing want of authority in the commissioners to sell, because of any force intended to be given, or that could possibly be given, to the certificate of sale as evidence. On this point, I also refer specially to Blackwell on Tax Titles, third edition, 1869, chap. 3, p. 78, *et seq.*; Abbot *vs.* Lindenbower, 42 Missouri, p. 162, where the statute of Missouri, considered in this case, is identical with the language of the last *proviso* in section seven of our act of 1862. See also Iowa cases cited in notes to Blackwell.

That the Virginia decisions in 10 Grattan, cited for the tax purchasers, furnish no support to the claim made for the certificates of sale as conclusive evidence, will appear from a careful examination of those cases, and from the review of the Virginia legislation on the subject of its delinquent lands, given by Judge Joynes, delivering the opinion of the court in Bennett *vs.* Hunter, 18 Grat., p. 100.

6. The sale of the property by the commissioners without having given any notice of the tax, (except the short advertisement of September 11, before adverted to,) and without having made any demand for the payment of the tax either upon the premises respectively liable for the tax, or at any place whatever, or of any person whatever, and without having made any attempt to collect it by distress of goods and chattels, rendered the sales void.

The acts of August 5, 1861, (12 Statutes, 292,) and of June

7, 1862, (Ib., 422,) so far as they relate to the direct tax, are acts *in pari materia*, and are to be considered together.

The *object* of both acts is one and the same, to wit: the collection of revenue—to collect a tax upon land, and to collect it with the least possible oppression and hardship.

The *means* provided for the collection of this tax by these acts, respectively, differ, but the *object and end* of both are identical.

Under the act of 1861, the officers appointed to collect the tax are denominated *collectors*.

Under the act of 1862, they are denominated *commissioners*.

These officers, though differently designated, are charged with the same general duty, viz: to collect the tax and pay it into the Treasury of the United States.

The manner in which *collectors* are to perform their duties in the collection of the tax, before resorting to a sale of the land, is particularly prescribed in section thirty-five of the act of 1861. (12 Statutes, 303.)

After receiving the lists from the assessors and within ten days, they are (1) to publish in the newspaper and to post up in four public places, notification that the tax has become payable, stating when and where they will attend to receive it, the time to be within twenty days after the notification; (2,) with respect to persons who do not attend according to the notification, it is made the duty of the collector to apply once at their respective dwellings, within the district, and there demand the taxes payable by such persons, such application to be within sixty days after the receipt of the lists; (3,) if the taxes be not paid then or within twenty days thereafter, the collectors are authorized to distrain the goods and chattels of the delinquent. On the failure of all these steps to produce the tax, the collectors are then authorized (section 36) to sell the land itself, which section also prescribes the course to be pursued by the collectors in making such sales.

Under the act of 1862 no directions at all are prescribed to the *commissioners* as to the manner in which *they* are to proceed in the collection of the tax before resorting to a sale of the

lands. The only directions given them, are those which prescribe the course to be pursued by them in making these sales. Indeed, the act of 1862 is wanting entirely in directions to the commissioners upon very many points connected with the discharge of their duties, with respect to which it cannot be supposed that they were intended to be left without direction. For example, there are no directions as to when and how they shall pay over the taxes received by them; no directions, in fact, to them, to pay over the taxes at any time to any body. The explanation of these seeming omissions is found in the fact that these two acts are to be taken together and are to be construed and treated as if they were, in form, what they are, in effect, to wit: parts and parcels of one and the same act.

The general duty of both collectors and commissioners being the same, viz: to collect the tax and pay it into the Treasury, the provisions of the act of 1861, prescribing the conduct of the *collectors*, are applicable also to the conduct of the *commissioners*, under the act of 1862, so far as the two acts are not in conflict, and so far as the general object of both acts and the principles of natural justice require. The commissioners under the act of 1862 are not to look exclusively to that act, in the discharge of their duties, but they are to look also to the fomer act in so far as that is plainly applicable.

What reason can be assigned for supposing that the commissioners were not required or expected to take any steps toward collecting the tax before proceeding to sell the land; that they were merely to figure up the amount of the tax, and then, without giving any notice of it, or making any demand for it, to sit silently in their office for sixty days, and at the end of that time to advertise and sell all the land as delinquent? The act of 1861 originally contemplated that its provisions should be carried out in the insurrectionary States (see section 52, page 311) when their condition would admit of it, as well as in the adhering States.

The act of 1862 certainly contemplated that the owners of land should have an opportunity of paying the tax and of preventing a resort to the land itself; it certainly contemplated

that they should have *some* notice that they were required to pay a tax, and the act being entirely destitute of any directions whatever on the subject, whilst the act of 1861 contains very explicit directions, the only reasonable conclusion is, that those directions were to be followed in collecting the tax under the act of 1862.

If these directions are not applicable, then we are forced to the conclusion that Congress intended to subject the property of the citizen to sale for non-payment of a tax without previous information being given him that any tax was due from him. Of course no such conclusion will be accepted where the case admits of any other.

But if there had been no explicit directions on the subject in either act, the principles of natural justice require that a man shall be notified that a duty is required of him before he can be adjudged in default for its non-performance.

Blackwell, chapter 8, "*Of the Demand of the Tax.*"

Nor can it be said that the property owner does get notice of the tax when his land is advertised for sale; *that* advertisement is not intended as a notice to *him* to come forward and pay; it is a notice to the public to come forward and buy, because he has *failed to* pay.

The 7th section of the act provides, it is true, that all lands on which the tax shall not have been paid, as provided for in the 3d section, shall be advertised and sold, &c.; but this cannot be construed as warranting a sale *unless the tax remains unpaid after all necessary steps for its collection have been taken, without effect.*

That such is the proper construction, see Parker *vs.* Rule's Lessee, (9 Cranch, 64,) where the Supreme Court placed the same construction upon a corresponding provision of the direct tax act of 1798, (1 Statutes, 597,) holding that, although the 13th section of that act required the collector to sell all lands on which the tax had remained unpaid for a year, and contained no reference to the sections which preceded it, it was nevertheless to be administered in subordination to the provisions of those sections, and a sale under it would not be valid, unless all

the steps required by those provisions had been first regularly taken.

I respectfully ask a critical examination of the case in 9th Cranch in connection with the act of 1798, under which it arose, and I submit that the views of the court in that case respecting the obvious anxiety of Congress to avoid the collection of the tax by coercive means are equally applicable to the acts of '61 and '62. They are literally, as well as substantially, applicable to the act of August, '61, and can they be less so to the act of '62? Is it to be supposed that Congress intended that the tax should be collected under the act of '61 with the *least* possible hardship to the citizen, and that under the act of '62 it should be collected with the *greatest* possible hardship; that coercive means should be *avoided*, as far as practicable, under the one act, and *be resorted to*, as far as practicable, under the other act? Can any reason be assigned for such difference of intent? The object of both laws, as we have seen, was one and the same. Both acts were dealing with citizens, as such, liable for the payment of a tax—*not* with citizens as rebels or enemies. Other acts provided for dealing with them in these latter characters.

The act of '62, it is true, was to operate in insurrectionary districts, but it will not be maintained that it was designed to inflict punishment upon persons residing or owning lands in insurrectionary districts; for it must be remembered that much property in the insurrectionary States was owned by citizens and residents of the adhering States. Yet there is no theory on which to impute any difference of intent in this particular under the two acts, except that the act of '62, though professedly an act for the collection of a tax, was covertly an act imposing punishment for crime—a theory which a decent respect for Congress will exclude, at least, from the courts of the United States.

The act of '62 was clearly *administered*, according to the evidence of the commissioners themselves, as though its leading object was to cause the largest possible amount of sales of private property, and the collection of the tax was intended as a

mere cover to produce that result; as if the professed and declared object of the act was only a blind to accomplish another and a very different purpose. Had such been, indeed, the correct construction of the act, it could not have been administered more effectually than it was to secure the results intended. There was a thorough and complete reversal of the entire act—a substitution of the means for the end, and of the end for the means—a general failure and refusal of the commissioners to do what the law required them to do, and a doing of that which the law forbade them to do. Under such a distorted construction and administration of the law, the property of the plaintiffs in these cases has been sold. Shall the sales be sustained?

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February 10, 1871.